(14)

No. 05-5705

Supreme Court, U.S.
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In The Supreme Court of the United States

HERSHEL HAMMON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writ Of Certiorari To The Indiana Supreme Court

JOINT APPENDIX

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03/04/2003	Miami Circuit Court of Indiana	Information Filed Against Petitioner for Domestic Battery
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05/09/2003	Miami Circuit Court of Indiana	Petitioner Found Guilty of Domestic Battery
05/29/2003	Miami Circuit Court of Indiana	Presentence Investigation Report Filed
06/06/2003	Miami Circuit Court of Indiana	Petitioner Sentenced to One Year in Miami County Jail, All but Twenty Days Suspended
06/20/2003	Court of Appeals of Indiana	Notice of Appeal Filed by Petitioner
06/14/2004	Court of Appeals of Indiana	Opinion Issued, Petitioner's Conviction and Sentence Affirmed
09/08/2004	Indiana Supreme Court	Petition to Transfer Jurisdiction to the Indiana Supreme Court Filed by Petitioner
12/09/2004	Indiana Supreme Court	Oral Argument Heard on Petition to Transfer
12/09/2004	Indiana Supreme Court	Petition to Transfer Granted
06/16/2005	Indiana Supreme Court	Opinion Issued, Petitioner's Conviction and Sentence Affirmed

STATE OF INDIANA, SS: IN MIAMI CIRCUIT COURT
GENERAL TERM

COUNTY OF MIAMI,

STATE OF INDIANA
VS CAUSE NO. 52C01-0302-CM-57
HERSHEL HAMMON

STATE OF INDIANA)
) SS: Hammon, Hershel R.
COUNTY OF MIAMI)

BATTERY AFFIDAVIT

On or about the 26*day of Feb., ~~19~~2003, in Miami County, State of Indiana, Hershel Hammon (Defendant's Name) did knowingly touch Amy Hammon (Victim's Name) in a rude, insolent and angry manner, to-wit: Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter. (Describe the Acts)

Which touching resulted in the bodily injury to Amy L. Hammon (Victim's Name)

I understand that the investigating officer is relying upon my allegations set forth in the affidavit as establishing

* [Original Form filled in by hand.]

Probable Cause for the arrest of the defendant on the charge of Battery under IC 35-42-2-1.

/s/ Amy L. Hammon
Victim/Witness

/s/ J. Mooney
Investigating Officer

AFFIRMATION

I affirm under the penalties for perjury that the foregoing representations are true. I further understand the provisions of the false informing statute and declare I am reporting a crime.

/s/ Amy L. Hammon
Victim/Witness

Time 11:30 pm

Date 2/28/03

Location 590 E. 5th

STATE OF INDIANA,

SS: IN THE MIAMI CIRCUIT COURT

COUNTY OF MIAMI, GENERAL TERM

STATE OF INDIANA

VS CAUSE NO. 52C01-0302-CM-57

HERSHEL HAMMON

TRANSCRIPT OF THE EVIDENCE

BRENT DAVIS

DEPUTY PROSECUTOR

COURT HOUSE

PERU IN 46970

REPRESENTING THE STATE

APPEARANCES:

ROBERT A. SPAHR

MIAMI COUNTY PUBLIC DEFENDER

55 SOUTH BROADWAY

PERU IN 46970

REPRESENTING THE DEFENDANT

TRANSCRIPT VOLUME ONE OF ONE

CONTAINING PAGE 1 THROUGH PAGE 41

[1] **05-09-03** BY THE COURT: Mr. Hammon. And there are two Cause Numbers, is that correct?

BY MR. DAVIS: That is correct.

BY THE COURT: Is one of them a probation violation?

BY MR. SPAHR: That's correct.

BY THE COURT: State of Indiana versus Hershel Hammon. Two Cause Numbers 52C01-0209-CM-356 and 52C01-0302-CM-57. Mr. Hammon appears in person along with his attorney, Robert Spahr, and Mr. Davis is here for the State of Indiana and this matter is on the Court's calendar for . . . I assume it is trial on the February 2003 case and if he is found guilty of that offense then that is the basis, underlying basis for probation violation.

BY MR. SPAHR: That is how it's laid out.

BY THE COURT: Okay.

BY MR. DAVIS: Actually Judge the State is proceeding to trial on the probation violation today.

BY THE COURT: And what are we doing with this, the more recent case?

BY MR. DAVIS: We may be dismissing it.

BY THE COURT: Okay.

BY MR. SPAHR: The Court please. I believe that . . .

BY THE COURT: So it's a Fact-Finding hearing?

BY MR. SPAHR: No.

BY THE COURT: A Probation Violation would be a Fact-Finding hearing.

BY MR. SPAHR: Well yes it is Judge, however, the whole basis for the probation violation is the commission of a Domestic Battery, that is the CM-57.

[2] BY THE COURT: Okay.

BY MR. SPAHR: We need to go to trial on CM-57 in order for, at least this is our view, before there's even an issue of a violation of probation. So were asking the Court to proceed on the CM-57 and call their first witness.

BY MR. DAVIS: Judge I believe that we can proceed under the probation violation showing the factual basis that the battery occurred.

BY MR. SPAHR: We disagree with that observation. It calls for a judicial conclusion that a crime occurred on the Domestic Battery this year and that . . . , it isn't just a factual basis, it is in effect the commission, it's alleged, commission of Domestic Battery.

BY THE COURT: I think this is a fascinating question and I don't know the answer right now. And I think that it's pretty significant because if you are going to a fact-finding hearing your burden is only by a preponderance and if you do a trial it's beyond a reasonable doubt.

BY MR. SPAHR: Correct.

BY THE COURT: I'm thinking I need to go read some law.

BY MR. SPAHR: Thank you Judge.

BREAK.

BY THE COURT: I think this is what we need to do. You have the burden of proof and since this matter was

set for trial on the Domestic Battery, is it a Domestic Battery or just a Battery?

BY MR. DAVIS: It's a Domestic Battery.

BY MR. SPAHR: Domestic Battery.

BY THE COURT: Your burden of proof there is beyond a reasonable doubt. [3] You could proceed, you can proceed on both of them. I imagine the factual basis is the same for each of them. It might be that you prove the probation violation without getting to the beyond a reasonable doubt. I think you have to go to trial today because it's been set on the Court's calendar and the Defendant is anticipating a trial today. So it may be that the finding at the end of it all will be that you have demonstrated by a preponderance that he did commit domestic battery by, you haven't taken it to beyond a reasonable doubt.

BY MR. SPAHR: I would indicate to the Court also that it's my understanding that the victim is not here and had been subpoenaed to appear I believe.

BY MR. DAVIS: That's correct.

BY MR. DAVIS: That would go to our standard of proof I think. If I'm understanding the Court correctly we're going to proceed, may proceed simultaneously on . . .

BY THE COURT: On both counts.

BY MR. DAVIS: . . . on both causes.

BY THE COURT: On both causes, uh-huh.

BY MR. DAVIS: And the Court may be in a position to find on one and not the other.

BY THE COURT: Sort of the . . . it's the O.J. Simpson.

BY MR. DAVIS: Okay. We'll proceed on that basis.

BY THE COURT: Okay. Any opening statements?

BY MR. DAVIS: Judge, the Defendant is charged with Domestic Battery which occurred on February 26th, 2003 which we allege that uh . . . he did knowingly and intentionally touch Amy L. Hammon, who is or was the spouse of the Defendant [4] and all that activity occurred in this venue and contrary to the statute of 35-42-2-1.3.

BY MR. SPAHR: We have no response.

BY THE COURT: Call your witnesses.

BY MR. DAVIS: Yes please Your Honor, call Jason Mooney.

BY THE COURT: Officer Mooney. Would you swear that the testimony that you are to present to the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

BY OFFICER MOONEY: Yes [inaudible] Your Honor.

BY THE COURT: Have a seat please.

BY MR. SPAHR: Ask the Court to uh . . . for a separation of witnesses. If there is any witnesses other than this gentleman, I would like them out of the Courtroom.

BY THE COURT: Are there any other witnesses Mr. Davis?

BY MR. DAVIS: Yes Your Honor, I plan to call Gail Raber from the probation department.

BY THE COURT: Ms. Raber, would you leave the Courtroom please?

DIRECT EXAMINATION

BY

BRENT DAVIS:

Q Officer Mooney, state your name for the record please?

A Jason Mooney.

Q And you're employed by the Peru Police Department?

A Yes I am.

Q And how long have you been employed by them?

A Approximately three years, since October of 2000.

[5] Q And what are your primary duties with the Police Department?

A I'm a second shift patrol officer.

Q Recalling your attention to February 26th of 2003, were you on duty for the police department on that day?

A Yes I was.

Q And do you recall being dispatched to the location of 590 East Fifth Street in Peru, Indiana?

A Yes I was dispatched to a Domestic Disturbance at that address.

BY MR. SPAHR: I'm sorry, he's speaking too fast I can't hear him.

A I was dispatched to a domestic disturbance at that address.

BY MR. SPAHR: I object to the characterizations to why he was being dispatched to, ask that it be stricken from the record and ask that he . . . his anser [sic] beyond the form of the question as a volunteered statement.

BY THE COURT: Probably the easiest thing Officer Mooney is directly answer the . . . the questions that Mr. Davis presents to you.

Q What was the nature of the complaint that you were dispatched to that location?

BY MR. SPAHR: Objection. Cause is leading.

BY THE COURT: I would overrule that objection.

BY MR. SPAHR: I'll object because it is . . . it is . . . it is a hearsay statement.

BY THE COURT: I overrule that. It is not a hearsay statement. It is intending to show why he is going to do what he is going to do and it doesn't necessarily suggest the truth. So your objection is overruled.

A My initial dispatch I believe was to attend 10-16 which is a fight, domestic [6] disturbance.

Q And when you arrived at that location, whom did you encounter?

A Amy Hammon.

Q Okay. And what was your conversation with her?

BY MR SPAHR: Objection, hearsay.

BY MR. DAVIS: Your Honor, in Trial Rule 101, the probation violation matters pertaining to probation believe the trial rules do not apply and reliable hearsay would be acceptable.

BY MR. SPAHR: If the Court please. The victim, alleged victim is not here, he's not an eye witness. It is, if it's being offered to prove the elements of the offense and he's not an eye witness, it's hearsay. Our belief is that and we're asking the Court not to permit him to do the hearsay bit even if it . . . even if it could come in as a probation violation, we're doing double duty here.

BY THE COURT: That's correct.

BY MR. SPAHR: And we're asking the Court if yo:'re going to do that then you wear two hats here when you're evaluating the truth of these statements.

BY THE COURT: I understand that.

BY MR. DAVIS: I believe the Court can evaluate the weight of that evidence to the two different standards we're proceeding under here. Is there an objection?

BY MR SPAHR: There's an objection. The standing objection is to any statements that are attributed to Amy L. Hammon. Number one, there's no indication that Amy L. Hammon was the person he was talking to.

BY MR. DAVIS: I believe he can identify the person that he talked to.

BY MR. SPAHR: Well, that's not part of the evidence yet.

[7] BY MR. DAVIS: Judge, I believe if we're going to proceed under Cause 356 and 57, it may not be . . ., it may be hearsay under 57 but I believe it's admissible under 356, which is the probation violation.

BY THE COURT: I think it's admissible under both. Go ahead. And I think it's an excited utterance exception.

BY MR. DAVIS: Yes.

Q Who did you encounter initially in that location?

A Amy Hammon.

Q Okay. Now what did you . . . what were your observations of Ms. Hammon?

A At first I asked her . . .

BY MR. SPAHR: Objection as to any statement she made.

BY THE COURT: He asked you for your observations.

A My observation at first is that she seemed somewhat frightened speaking to me.

Q Okay. What was your . . . did you make any observation of the premises at that time?

A I was on the front porch and I had not entered the premises at that time.

Q Okay. Okay, tell us what Ms. Hammon said to you.

BY MR. SPAHR: Again, objection as hearsay. It is not an excited utterance. In my opinion it is not an excited utterance unless there's facts presented that would substantiate that this officer had some clue as to the duration between one avant [sic] and when the statement is made.

BY THE COURT: Establish your basis.

Q You testified that you were dispatched on the complaint of a domestic [8] disturbance.

A Yes.

Q And you testified that Ms. Hammon was the first person you encountered there.

A Yes.

Q What did you believe . . . what . . . what was her state of mind at that time or what was her behavior?

A Timid, she seemed frightened.

Q Did her behavior give you cause to believe that she had information regarding the reason why you were dispatched to the location?

A Yes.

BY MR. SPAHR: Objection. Calls for conclusion.

BY THE COURT: Overruled. We're going to proceed Mr. Spahr. I want to hear the story and your objection is overruled. I will show it as a continuing objection.

BY MR. SPAHR: Thank you Judge.

Q Now please tell us what Ms. Hammon said to you.

A My first question to her was if there was a problem there and if anything was going on. She stated "No." That everything was okay at that time. Due to her fact of being timid and somewhat frightened . . .

BY MR. SPAHR: Objection, he's going beyond the scope of the question. Involuntary statement.

BY THE COURT: Go ahead Mr. Davis.

Q Do you recall exactly what she said to you?

[9] A She stated nothing was the matter, that everything was okay.

Q Okay, and then what did you do after that?

A I asked her if it was okay if I could come in the residence and check things out to make sure for myself that everything was okay.

Q Did she give you consent to do that?

A Yes she did.

BY MR. SPAHR: Objection. Again, presumably . . .

BY THE COURT: I am showing it as a continuing objection Mr. Spahr.

BY MR. SPAHR: My point Judge, it's . . . it's not only hearsay but it's also . . . it's tried to bootstrap a consent that is . . . I think there is another way of getting it in perhaps.

BY THE COURT: Go ahead.

Q Based upon the response to your question what did you do next?

A In response to my initial question if everything was okay?

Q Yes.

A I continued to investigate and asked her if it was okay if I could come into the residence.

Q Did you in fact enter the premises?

A Yes.

Q Give us your observation of the premises.

A My first observation was, I walked through the entryway I believe into the living room and I noticed the living room to be in a little bit disarray. I noticed there was a . . .

BY MR. SPAHR: Objection

[10] BY MR. DAVIS: This is a first hand eye witness account of what he saw.

BY MR. SPAHR: The statement suggests that he's been in the home before in order to make a comparison. Object to this as being characterized as out of order and I'd ask the Court to establish . . . have counsel establish whether or not this gentleman had ever been in the apartment or house before.

Q In the course of your employment with the Peru Police Department have you had an occasion to investigate a number of domestic disturbances?

A Yes.

Q And in the course of that investigation, you've entered a number of premises?

A Yes.

Q In your opinion, was there something that you observed in the premises to indicate why you were dispatched to that location?

A Yes.

Q Okay. What was that?

A There was a, I believe a gas heating unit in the corner of the living room which I noticed first there was flames coming out of the front of the unit, had a glass front, partial glass front. There was pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit. Appeared as if it had been broken, I'm assuming recently.

BY MR. SPAHR: Objection, assumptions, conclusions.

Q Did uh . . ., you encounter the Defendant, Mr. Hammon, in the premises?

A Yes I did.

Q What did you say to him, what did he say to you?

[11] A I again asked Mr. Hammon if everything was okay at that residence. If he and his wife had been in an argument. He stated "Yes" but that everything was fine now and it never became physical.

Q Where did you proceed after that?

A I proceeded to enter the living room where Amy was located to speak with her.

Q And what did she tell you at that time?

BY MR. SPAHR: Objection, hearsay.

BY THE COURT: I'll show it as a continuing objection.

A She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became verbal, excuse me, the argument became physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater . . .

BY MR. SPAHR: Objection as to the physical aspects of this matter, it's all hearsay.

Q Are you reporting what she told you?

A Yes.

Q Did she tell you that . . .

BY MR. SPAHR: Objection, leading.

BY MR. DAVIS: Same objection?

BY THE COURT: No, a leading objection is different from hearsay objection.

[12] BY MR. DAVIS: Oh it's a leading objection, I thought . . . okay.

Q What did . . . what did she tell you in regards to the physicality of the altercation?

A She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

Q What happened next with respect to your activities?

A During that activity I was aware that Mr. Hammon would walk into the living room to, in my opinion . . .

BY MR. SPAHR: Objection as to his opinion. What he observed will . . . that was the question.

Q After your conversation with Mrs. Hammon, where did you direct your attention next? What did you do after you finished your conversation with Mr. Hammon?

A I had her fill out and sign a battery affidavit and I asked her if she would.

Q Provide to you State's Exhibit 1, Officer Mooney, can you identify that document?

A Yes, this is the Battery Affidavit which Amy filled out.

Q Is that a normal part, routine of your investigation in these type of matters?

A Yes.

Q And what's the purpose of that document?

A To establish events that have occurred previously.

Q Is your signature on the document?

A Yes it is.

[13] Q And did you witness the document being prepared?

A Yes I did.

Q What does the document recite then?

BY MR. SPAHR: Objection.

A It recites the events . . .

BY MR. SPAHR: Objection. The document will speak for itself. I'm not going to ask the Court to have this read into the record until such time it's offered and at that point I'll be glad to make an objection about it's [sic] admissibility.

BY MR. DAVIS: No further questions regarding the document. State would offer Exhibit 1.

BY MR. SPAHR: And we will object since the person who prepared the document is not here to cross-examine about the truth or veracity of the statements being made therein.

BY MR. DAVIS: I would note to the Court the uh . . . Affidavit is under oath.

BY MR. SPAHR: That doesn't give us the opportunity to cross examine to [sic] person who allegedly drafted it. Makes me mad.

BY THE COURT: You might want to refresh your memory regarding the hearsay rules. I would point you to Rule 803. Here. Right there. At what point in time

was this made, this statement made? When was it made during the course of your investigation?

A Towards the end.

BY THE COURT: Okay. I mean, that evening or . . .

A Yes that evening.

BY THE COURT: . . . three weeks later.

[14] A Yes.

Q Is it your practice to have a document prepared temporaneously with the event . . . with your investigation? Was it done at that same time you were there?

A Yes.

Q Was the person preparing the document doing so on the basis of recent events?

A Yes.

BY MR. SPAHR: Objection. Calls for conclusion on his part. He wasn't there to observe anything.

BY THE COURT: You may answer.

A Yes.

BY MR. DAVIS: We're going to offer the document Your Honor under a present sense of impression.

BY MR. SPAHR: It's a hearsay statement. No opportunity to cross-examine the witness.

BY THE COURT: I think that 803 states that a document that's filled out under a present sense impression the declarant availability is immaterial and I will show it admitted.

PLAINTIFF'S EXHIBIT ONE SO OFFERED AND ADMITTED IS IN THE WORDS AND FIGURES, TO-WIT:

Q Did you observe any injuries to Mrs. Hammon?

A No.

[15] Q Did she indicate to you that she has any injuries or pain?

A She was, while speaking to her she was rubbing her . . .

BY MR. SPAHR: Again, renew my objection to any statements attributed to her.

BY THE COURT: We'll show it as a continuing objection.

A While speaking to her she began rubbing her right eyebrow, above her right eyebrow and she informed me that that was where her head was shoved into the glass and it was hurting her at that time.

Q Did you review the Affidavit, State's Exhibit 1?

A No.

Q In regards to Ms. Hammon's statement in the Affidavit, is that concurrent with what she told you as to what happened to her?

A Yes it does.

Q Does she indicate in the Affidavit that she was hurt by being pushed to the ground?

A Yes it does.

Q Okay. Did Mrs. Hammon tell you that she and Hershel were married?

A Yes.

Q That she was Hershel Hammon's wife?

A Yes.

BY MR. DAVIS: No further questions.

CROSS EXAMINATION

by

ROBERT SPAHR:

[16] Q Officer, do you . . ., your earlier testimony is that you have been a Peru Police Department Officer for approximately three years.

A Yes.

Q All right. And how many times in your career have you been in the household of Amy and Hershel Hammon?

A To the best of my knowledge, zero.

Q Before this event?

A Correct.

Q So, had you had any opportunity at any earlier date than the date I think alleged, February 26th, 2003, to know whether or not a telephone was broken or a heater was broken?

A No.

Q Did you see the telephone broken?

A I did not see the telephone.

Q You saw the results of a broken telephone maybe?

A Correct.

Q You saw the results of a broken heater?

A Correct.

Q Have you ever had a woman lie to you in your life?

A Yes.

Q And then discovered that it was a lie what she said?

BY MR. DAVIS: I'm going to object, I don't know what the material basis of that is.

BY MR. SPAHR: Judge, the material basis is that in personal experience [17] sometimes people make complaints that are false or they make lies and I'm trying to build that he has no personal knowledge other than the statements she made. I believe that I have the right to inquire in his experience . . .

BY THE COURT: Go ahead.

BY MR. SPAHR: . . . of people in his capacity lied to him.

BY THE COURT: I'll overrule the objection. Go ahead.

Q Thank you. Your earlier testimony you had a woman at some time in your life lie to you.

A Yes.

Q In the course of your practice, your services to the City of Peru as a Police Officer have you ever had women lie to you about injuries that they have received?

A I'm not sure I can answer that question truthfully.

Q Well . . .

A I don't recall, I have no . . .

Q . . . just . . . if . . . if you're not sure. Have you ever had anybody make a false crime report?

A Yes.

Q Yeah. Does it necessarily mean it's only men who make false crime reports?

A No.

Q Do women sometimes make false crime reports?

A Sure.

Q From your standpoint were you in uniform when you came to the house on that day?

[18] A Yes I was.

Q All right. And were you carrying a gun?

A Yes I was.

Q And did you know Amy at all at that time when you first came to the door?

A I don't believe so.

Q Did you know of Hershel Hammon at that time?

A No. No.

Q All right. When Amy told you, or when that lady you met at the door told you that everything was okay, why did you pursue further inquiry when you were told that everything was okay?

A I didn't feel safe leaving the premises when we were responding to a call of a fight due to her state of frighteness. I didn't know if someone had told her to tell them everything was okay and that everything actually wasn't. It's my job to investigate further than just the beginning realms.

Q When you came to the door, did you hear arguments coming through the door?

A No.

Q The sound?

A No I could not.

Q Could you hear things crashing in the house?

A No.

Q At anytime while you were there did you see anything thrown or broken?

A No.

Q [Inaudible]?

[19] A No.

Q As I understand there were just two people in the house when you were there?

A Just two people?

Q Well I think your . . .

A Officers or . . .

Q . . . earlier testimony was Amy and, and Hershel. I didn't hear anybody else present.

A There were children there.

Q Children?

A Yes.

Q Okay. Do you know whose kids they were?

A I believe at least two of them were Amy and Hershel's.

Q I'm sorry I didn't understand.

A I believe that two of them were Amy and Hershel's.

Q Children. I see.

A Yes.

Q Were there more kids than that?

A Not that I recall.

Q Okay. From your standpoint, when Amy came to the door were you . . . other than she seemed timid or frightened or whatever, did you see any . . .

[END OF CD #03-20] [BEGINNING OF CD #03-21]

Q . . . injury to her person?

A No.

[20] Q Did she complain to you about pain at that moment?

A No.

Q Did you see any injury to her person?

A No

Q Does it come as a surprise to you that sometimes people argue?

A No.

Q We're talking husband and wife.

A Sure.

Q Does it come as any surprise to you that sometimes people throw things in the house?

A No.

Q Did she indicate that Hershel had thrown the telephone at her?

A I don't recall.

Q No, well you'd recall that if she said it. Did Hershel admit to you that he had thrown anything at her?

A No.

Q Did he admit to you that he had broken the heater?

A No.

Q Did he tell you that the heater was broken?

A No.

Q Did Hershel tell you that he had thrown Amy down?

A No.

Q Did you ask him?

A I don't recall.

[21] Q Did you ask him if he had broken the heater?

A I don't recall that either.

Q Did you ask him if he had broken a telephone?

A I don't recall.

Q Did you ask him about any injury above Amy's eye that was causing her some pain but wasn't evi[inaudible] as an injury?

A I don't recall.

Q What else do you recall that you observed in the house? Observed . . . eyes.

A Nothing. Nothing comes to mind.

Q I'll make it as easy as I can. Did you observe Hershel yelling at Amy?

A No.

Q Did you observe Hershel throw anything on Amy?

A No.

Q Did you observe Hershel push Amy down to the ground?

A No.

Q Did you observe Hershel hit or kick Amy?

A No.

Q Did you ever see any bruising on Amy that day?

A No.

BY MR. SPAHR: That concludes the questions of this witness.

BY THE COURT: Mr. Davis.

RE-DIRECT EXAMINATION

BY

BRENT DAVIS:

[22] Q Officer Mooney, I think you previously testified that uh . . . , Mr. Hammon . . . you approached him, he said "everything was okay."

A Yes.

Q Did that indicate to you that he was denying that anything happened?

BY MR. SPAHR: Objection. Beyond the scope of the questioning.

Q What did that indicate to you?

BY MR. SPAHR: Judge, this is beyond the scope of re-direct.

BY THE COURT: I don't think it is. You asked him about all of his observations and what was happening. I think it's continuation. Go ahead.

Q Mr. Spahr asked you in response . . . or in the questions about did you ask Mr. Hammon if he committed certain things towards Mrs. Hammon? You said you don't recall if you did or your recollection was you had not. My

question was, when you first encountered Mr. Hammon did he state that everything was okay?

A Yes.

Q And on the basis of that, did you feel the need to ask him further questions?

A No.

Q In your course of investigating these type of complaints, is it also a fact that defendants or persons committing batteries sometimes don't tell the truth too?

A Yes.

Q In your experience of investigating these types of matters, what would be your conclusion as to the most prevalent of parties telling . . . of parties telling you falsehoods?

[23] BY MR. SPAHR: Calls for conclusion on his part. How is he . . . he's not the ultimate Judge of this . . . of those other incidents that he was involved with, presumably a [Inaudible]. As to this particular incident is the issue and, I mean he can have his own conclusions I suppose as to what he observed in the house but . . . and I thought that was what he was testifying to but counsel's trying to broaden that sort of thing to, well how many other episodes in the community, well that's not relevant to this case.

BY THE COURT: I think that he's continuing the inquiry that you had regarding false complaints that are made and I think the inquiry is have there been false denials made to him also or is it his assumption that there are false denials made to him?

BY MR. SPAHR: Well, and I think Judge that in fact he got that answer but then to broaden it out as to a conclusion as to in effect a percentage of how many false denials there are and that's getting beyond the scope of his capacity as an expert.

BY THE COURT: I haven't . . . I don't think I've heard Officer Mooney's answer yet. I wasn't sure that I heard your answer.

BY MR. SPAHR: You didn't hear the answer I don't think.

BY MR. DAVIS: Respond to the question.

A No.

Q Do you have any sense regarding your training in investigating these matters which might be more likely of, I suppose Defendant or batterer to deny that activity or a person who was battering . . .

A Yeah . . .

[24] Q . . . giving a false report?

BY MR. SPAHR: I object to his qualifications.

Q Based upon your training again, observation.

BY THE COURT: Go ahead, you can answer.

Q What's your perception?

A I perceive that more often than I have been lied to by the batterer, the person committing the crime.

Q When you were talking with Mrs. Hammon, did you have any observations of Mr. Hammon at that time?

A I think it . . . to separate the two to investigate, another officer I believe was Officer Richardson was in the kitchen with Mr. Hammon at the beginning of my investigation. On at least two occasions that I can recall Mr. Hammon walked in the living [sic] while I was trying to speak to Mrs. Hammon. You know I can . . . , I can't assume why he did that, but I can . . . my observation of Mrs. Hammon when Mr. Hammon walked into the room was that she would become quiet, almost afraid to speak at that time.

Q Did Mrs. Hammon indicate to you that uh . . . the behavior of Mr. Hammon in relationship to her was, exhibited an angry manner? They . . . they weren't . . .

BY MR. SPAHR: Again objection.

Q Your observation of Mr. Hammon's mental state, you believe the activities to be in ang . . . touched her in an angry manner, pushed her down in an angry manner?

A Yes.

BY MR. SPAHR: Objection, never observed.

[25] BY THE COURT: I'll sustain that.

Q And describe Mr. Hammon's demeanor?

A Angry.

BY MR. DAVIS: No further questions.

RE-CROSS EXAMINATION

BY

ROBERT SPAHR:

Q Now bear with me now. Counsel just asked a question about his demeanor. Was Mr. Hammon angry when you came in the door? At first?

A I don't recall.

Q Well you just said he was angry so where was he angry?

A During my investigation Mr. Hammon became angry.

Q There we go. So, you're saying initially when you talked to him, he was okay? Is that correct? He wasn't angry?

A Could you define for me "okay"?

Q Well, you know pretty much as well as I do when people are angry you can tell. In either in stress in voice or facial. Was he angry with you when you first came in the door?

A No.

Q Okay. Was he polite to you?

A I don't believe he was polite either.

Q Excuse me?

A I don't believe he was polite either.

Q Okay. Um . . ., but he wasn't angry initially?

[26] A Initially.

Q Okay. Would you agree that at some point he became angry after you arrived?

A As opposed to before?

Q Ha, ha, I'm just talking about your observation. While he was in your presence initially when you came in the door, he wasn't angry. I think that's your testimony.

A Correct.

Q Okay. But he became angry after you've been in the home for a while?

A Yes.

Q Okay. Do you recall when he became angry?

A No I don't.

Q Was it about the same time as you telling him he was under arrest?

A No, I believe it was prior to that. I believe he became angry when I insisted that Mr. Hammon stay separated from Mrs. Hammon so that we can investigate what had happened. He felt as if it was his house, he should be able to move throughout his house as he wished.

Q Is that an unusual feeling for someone who lives at that residence?

A No, on the same scope he should have had the understanding that we need to investigate what was going on.

Q Okay. But the anger was directed to you folks as opposed to Amy?

A What I observed, yes.

BY MR. SPAHR: Okay. I think that's it. That's all.

BY MR. DAVIS: No further questions.

[27] BY THE COURT: Thank you Officer Mooney, you may step down.

AND FURTHER THE WITNESS SAITH NOT.

BY MR. DAVIS: State calls Gail Raber.

BY THE COURT: Would you raise your right hand please? Do you swear the testimony you present to the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

BY MS. RABER: I do.

BY THE COURT: Have a seat right here please.

DIRECT EXAMINATION

BY

BRENT DAVIS:

Q Gail, I'm going to ask a couple questions, beginning, just state your name for the record please.

A Gail Raber.

Q And how are you employed?

A I am the secretary of the probation department.

Q How long have you been employed by the probation department?

A 11 years.

Q During your duration of probat . . . , or employment with the probation department, you've had an opportunity to observe probationers come in and out?

A Yes sir.

Q Okay. Do you recognize Hershel Hammon?

A Yes I do.

Q Okay. Is he in the Courtroom?

[28] A Yes he is.

Q Is he the gentleman sitting next to Mr. Spahr?

A Yes he is.

Q From your course of employment do you know if Mr. Hammon is presently on probation?

A He is yes.

Q Your Honor I would ask the Court to take judicial notice of an order of probation dated 18th day of October of 2002, signed by Honorable Bruce Embrey, Judge of the Circuit Court. Ms. Raber, when an individual is on probation, are there certain rules and regulations to be followed?

A Yes there are.

Q Is it your experience that one of the standard rules of probation would be that a probationer is not to commit any act which would be a crime either felony or misdemeanor?

A That's correct.

Q Have you had an opportunity to look at any documents indicating the dates of Mr. Hammon's probation?

A I believe by looking at the rules of probation it was October of 2002 to October of 2003.

Q Do you recall the length of time Mr. Hammon was on probation from that order?

A It would be one year from the date of 2002.

Q And the date of February 26th of 2003 would fall within the time prior to the expiration of probation?

[29] A Yes it would.

Q No further questions of Ms. Raber.

BY MR. SPAHR: No questions.

BY THE COURT: You can step down.

AND FURTHER THE WITNESS SAITH NOT.

BY MR. DAVIS: State rests.

BY MR. SPAHR: At this time the Defendant moves for a finding of not guilty on the CM-57, there's been no proof beyond a reasonable doubt for this Court to conclude that Mr. Hammon is guilty of the offense of Domestic Battery.

BY THE COURT: Could I have my exhibit back please? Thank you.

BY MR. DAVIS: [inaudible].

BY THE COURT: Yes I will so note that, that he was placed on probation October 18, 2002 by Order of the Honorable Bruce Embrey.

BY MR. DAVIS: Thank you.

BY THE COURT: Going to deny your motion Mr. Spahr for judgment on the evidence. Do you have any defense to present?

BY MR. SPAHR: Not presenting any evidence on CM-57.

BY THE COURT: Okay.

BY MR. SPAHR: Ask the Court for determination that there has not been proof by a preponderance of the evidence that there was in fact a probation order in place. Since the state failed to present as part of it's [sic] evidence which cause number they were referring to in soliciting the testimony of a probation secretary. I would indicate that the Court can't take judicial knowledge without reference to a cause number.

BY THE COURT: Well, I'm going to have to listen to the record then.

[30] BY MR. SPAHR: And I might add, there's no copy of the order placed into evidence.

BY THE COURT: It is in the Court's file and we started this trial in 52C01-0209-CM-356 and so I believe the Court does know the case that is being tried here and he referred to the probation order in that cause number so I will deny your motion.

BY MR. SPAHR: There's no evidence to be presented under 356.

BY THE COURT: All right.

BY MR. SPAHR: We rest.

BY THE COURT: Okay. Let me take a few minutes to look this over and look over my notes and I shall return.

OFF RECORD.

BY THE COURT: You can be seated. You can be seated.

BY MR. SPAHR: Can I please the Court?

BY THE COURT: Thank you Mr. Spahr.

BY MR. SPAHR: Just for the record if I may put it into the record Judge, the Court had earlier directed counsel to . . . was it's [sic] evidentiary rule 808, is that . . .

BY MR. DAVIS: 803.

BY MR. SPAHR: I'm sorry, 803.

BY THE COURT: 803 . . . 8.

BY MR. SPAHR: Okay, and we would ask the Court in reading that it appears both counsel, although I'm not trying to make an argument for you but in my review, law enforcement records, documents, are an exception, they do not . . . they're not included in the exception, the hearsay of exception and would ask the Court to [31] review that . . . that . . . is it paragraph 8?

BY THE COURT: It is 803 subsection, subparagraph 8.

BY MR. SPAHR: 8.

BY THE COURT: Uh-huh [yes].

BY MR. SPAHR: Again, and uh . . . , we believe that the statement taken by law enforcement and introduced through the officer that is attributed to Amy with not . . . , it would have been excluded in as much as law enforcement investigative report. They . . . they submit it to the person, they being law enforcement, submits it to the purported victim and the victim then completes it, law enforcement takes control and possession of the document at all times presumably because it came through this officer.

BY THE COURT: Mr. Davis.

BY MR. DAVIS: I think I concur . . . I concur with the fact that the Court finds that to be an investigative report. Which probably eliminated as an exception under 803.

BY THE COURT: Go to make a finding that the State has carried its burden and proven beyond a reasonable doubt that Hershel Hammon did commit Domestic Battery on Amy Hammon in Cause 52C01-0302-CM-57 and that subsequently a probation violation was filed in this Court in 52C01-0209-CM-356 and the State has established by a preponderance of the evidence that there was a violation of these rules of probation. I have a case Cox versus the State of Indiana, Court of Appeals case handed down September in 2002, 77NE 2d 1025 that is um . . . actually the trial of this case here and what the Appellate Court found specifically is that excited utterances are expressly permitted in these kinds of cases even if the declarant is [32] not available to testify. And on that basis I am finding Mr. Hammon guilty. Is there a recommendation as to sentencing and as to what we want to do

with probation violation, or do we want to reset this for sentencing?

BY MR. DAVIS: I would uh . . .

BY MR. SPAHR: We're ready today.

BY THE COURT: Do you have a recommendation Mr. Davis?

BY MR. DAVIS: I'm going to recommend that we reset?

BY THE COURT: How long do you want?

BY MR. DAVIS: Is it pre-sentence report?

BY THE COURT: It's a A Misdemeanor, do you want a pre-sentence?

BY MR. DAVIS: Do you want it modified . . .

BY MR. HUNERYAGER: Given what is involved, I don't know that it wouldn't be a bad idea.

BY THE COURT: Okay let's . . .

BY MR. HUNERYAGER: A short pre-sentence.

BY THE COURT: We've . . ., they are requesting a pre-sentence report and so I'm going to set this for four weeks from today.

BY THE COURT REPORTER: [Inaudible].

BY THE COURT: Let's have it on Friday morning. Our Thursday afternoons are getting pretty scarey [sic].

BY THE COURT REPORTER: June 6.

BY THE COURT: June 6th . . .

BY THE COURT REPORTER: At 9:00.

BY THE COURT: . . . at 9 A.M. And I'll direct the probation department to [33] prepare a pre-sentence report. Mr. Hammon you are to report to the probation department early next week so that they can begin collecting information to prepare a pre-sentence report. I've copied these, this case for each of counsel so that you can have copies of it.

BY MR. SPAHR: Thank you Judge.

BY THE COURT: Okay.

BY MR. SPAHR: So when are we set?

BY THE COURT: June 6.

BY MR. SPAHR: June 6.

BY THE COURT: 9 A.M.

BY MR. SPAHR: Thank you Your Honor.

BY MR. DAVIS: Thank you.

AND THAT WAS ALL THE EVIDENCE HEARD ON THIS DATE AT THAT TIME.

STATE OF INDIANA,

SS;

COUNTY OF MIAMI,

CERTIFICATE

I, Tawna Leffel, Official Reporter of the Miami Circuit Court of Indiana, do hereby certify that I am the Official Reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein;

That upon the trial in this cause held on May 9, 2003, I took on the recorder, all of the evidence given during the hearing in this cause, the objections of counsel thereto, and the rulings of the Court upon such objections; the introduction of exhibits, the objections thereto, and the Court's rulings thereon.

I further certify that the foregoing manuscript as prepared is a full, true, correct and complete copy of the recordings of said evidence.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my Seal, this 19th day of August, 2003.

/s/ Tawna Leffel
TAWNA LEFFEL
OFFICIAL REPORTER

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[1] **06-06-03** BY THE COURT: This is State of Indiana versus Hershel Hammon. There are two cause numbers, 52C01-0209-CM-356 and 52C01-0302-CM-57. Mr. Hammon appears in person along with his attorney, Robert Spahr, and the State is present by Brent Davis. We're here today

for purposes of sentencing. We were in Court on May 9th for a bench trial and the Court found that the offense of Domestic Battery had been committed following trial. It looks like judgement of conviction has not been entered and I will now enter Judgment of Conviction for that offense as a Class A Misdemeanor. I have received a pre-sentence report from the probation department. Mr. Hammon did you have an opportunity to look over the pre-sentence report?

BY MR. HAMMON: Yes Your Honor.

BY THE COURT: Okay. And Mr. Hammon or Mr. Spahr, are there any factual or any factual corrections or additions that need to be made in the pre-sentence report?

BY MR. SPAHR: There are no changes to report to be requested.

BY THE COURT: Are you satisfied with the pre-sentence report, Mr. Hammon, in that it sets forth essentially what we have before us today?

BY MR. HAMMON: Yes Your Honor.

BY THE COURT: Okay. I'm interested in knowing what the recommendations of both counsel and the State might be in this matter. Mr. Davis.

BY MR. DAVIS: Your Honor, may I ask for clarification on the pre-sentence report regarding time served and offenses, under days served, this would be on page 10 . . .

BY THE COURT: I had a question about that too.

[2] BY MR. DAVIS: . . . 11 and 12. It in days served in some instances seems to be reasonable amount of time and in other instances it seems to be a good deal of time was served.

BY THE COURT: It looks like the clock never stopped running.

BY MR. DAVIS: Yeah. I just, is there some clarification on that or how's that work?

BY THE COURT: This is page . . . look at page 10.

BY MS. GUSTIN: [Inaudible].

BY THE COURT: Okay.

BY MS. GUSTIN: [Inaudible].

BY THE COURT: It looks like I just did a division of 5273, first one at the top of page 10 by 365 and I get 14 years. So it looks like the clock has just never stopped running on any of these.

BY MR. DAVIS: That's what I thought. That was the only question I had.

BY THE COURT: Okay. Do you have a recommendation Mr. Davis?

BY MR. DAVIS: With respect to the recommendation uh, on page 6, the State would adopt probation department's recommendations.

BY THE COURT: Mr. Spahr?

BY MR. SPAHR: We certainly are not uh . . . , in opposition to the recommendations set out in the probation officer's recommendation page.

BY MS. GUSTIN: [Inaudible] addition to the recommendation [inaudible].

BY MR. SPAHR: Would want to make one, point out one thing to the Court. The no contact provision seems . . . sorry Cathy, unrealistic since the very letter that's attached as part of . . . part of the Addendum to the report, signed by Amy Hammon, [3] indicates obviously she doesn't want a no contact order.

BY MS. GUSTIN: Right, and I [inaudible] see that after I filed the report [inaudible] recommendations.

BY MR. SPAHR: So there is no Protective Order in place involving these two people. We'd ask that the Court not have any . . . any provision for no contact at this point.

BY MR. DAVIS: I would not object to that.

BY THE COURT: Mr. Hammon?

BY MR. HAMMON: Yes ma'am.

BY THE COURT: What do you have to say . . .

BY MR. HAMMON: I have no problem . . .

BY THE COURT: . . . about sentencing?

BY MR. HAMMON: I think that . . . that would be a good thing for me right now.

BY THE COURT: It's very clear in what you have submitted to the probation department that you

acknowledge your problems are coming from substance abuse.

BY MR. HAMMON: Yes ma'am.

BY THE COURT: How long has it been since you've had a drink?

BY MR. HAMMON: I would say a week or two.

BY THE COURT: Okay.

BY MR. HAMMON: Approximately.

BY THE COURT: Still struggling with it then?

BY MR. HAMMON: Struggling but not as much as I was when all this first happened.

BY THE COURT: Okay. I'll adopt the recommendations of the probation [4] department then and sentence you to one year in the Miami County Jail. Suspend all except for 20 days with good time credit and credit for three actual days served. You are placed on probation for a period of one year and your probation in 52C01-0204 is extended for . . . will terminate in October of this year and therefore this probation will commence in October of this year. You are to complete the Court's drug and alcohol evaluation. Follow any recommendations that come from that. You are to complete an intake evaluation at Four County Counseling Center to determine whether it is most appropriate that you participate in a domestic violence program or the anger management program and successfully complete the recommended program. You are to pay Court costs in the amount of $132.00, probation initial fees and the monthly user fee and as I said participate in

the Domestic Violence Program as directed or counsel by Four County Counseling Center.

BY THE COURT REPORTER: There is a $300.00 cash bond.

BY THE COURT: We will show that forfeited to the Public Defender fund. Do we want to set a time when he reports to the jail or do you want to do that . . .

BY MR. HAMMON: I'd like to have time to do that.

BY MS. GUSTIN: [Inaudible].

BY THE COURT: Okay. You want to give me dates when you can report to the jail? You'll be doing 7 actual days.

BY MR. HAMMON: Right. Your Honor if you could just give me thirty to sixty days to do that I'll just probably serve it all at once.

BY THE COURT: Okay.

BY MR. HAMMON: Um, I go to the hospital a lot in Indy right now with my [5] mother and dealing with my father, he's not doing well at all right now either so, so but I will take care of that.

BY MR. SPAHR: Sixty days then?

BY MR. HAMMON: Sixty days.

BY THE COURT: Why don't we just set a date of September the 6th . . . or September the 5th, which is a Friday evening, report at 5:00 on September the 5th and you will be release [sic] then seven days later.

BY MR. HAMMON: And if I can get there before that that will be . . .

BY THE COURT: No, the jail will . . .

BY MR. HAMMON: Okay.

BY THE COURT: . . . expect you on September the 5th.

BY MR. HAMMON: I can't get it done before that if it's more convenient?

BY THE COURT: Well, our jail is not a hotel. They aren't equipped to take people as they show up and when I say September 5th, then they will be, they know that they have to take you at that point in time.

BY MR. HAMMON: That will be fine Your Honor.

BY MR. SPAHR: So Judge, that extends through to when? September 5 to?

BY THE COURT: He would be released then on Thursday evening at 5:00. Seven days actual.

BY MR. SPAHR: Okay. Thank you very much Judge.

BY THE COURT: Your [sic] welcome.

BY MR. SPAHR: Does that conclude the sentencing portion?

BY THE COURT: That concludes it.

BY MR. SPAHR: Okay. Judge, I'm making an oral motion for appointment [6] of the public Defender,

State Public Defender to represent Mr. Hammon in an appeal of the conviction. Um . . .

BY THE COURT: We'll show you appointed.

BY MR. SPAHR: I'll file . . . , I'll supplement it with a written motion Judge.

BY THE COURT: Okay.

BY MR. SPAHR: Ask leave to withdraw after Public Defender enters its appearance.

BY THE COURT: Okay.

BY MR. SPAHR: Thank you.

AND THAT WAS ALL THE EVIDENCE HEARD ON THIS DATE AT THAT TIME.

STATE OF INDIANA,

SS;

COUNTY OF MIAMI,

CERTIFICATE

I, Tawna Leffel, Official Reporter of the Miami Circuit Court of Indiana, do hereby certify that I am the Official Reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein;

That upon the sentencing hearing in this cause held on June 6, 2003, I took on the recorder, all of the evidence given during the hearing in this cause, the objections of counsel thereto, and the rulings of the Court upon such

objections; the introduction of exhibits, the objections thereto, and the Court's rulings thereon.

I further certify that the foregoing manuscript as prepared is a full, true, correct and complete copy of the recordings of said evidence.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my Seal, this 19th day of August, 2003.

/s/ Tawna Leffel
TAWNA LEFFEL
OFFICIAL REPORTER

STATE OF INDIANA
PRESENTENCE INVESTIGATION REPORT
FACE SHEET

Dated Ordered: 5-9-03
Date Completed: 5-27-03

Warning: This report is confidential according to Ind. Code 35-38-1-13 and may only be released with specific authorization.

(Filed May 29, 2003)

COURT INFORMATION

Court: Miami Circuit Court /s/ Trudy McCrae
Clerk Miami Circuit Court
Judge: Rosemary Higgins Burke
Prosecutor: Eric Huneryager
Defense Attorney: Robert A. Spahr, Public Defender
Probation Officer: Cathy L. Gustin
Probation Dept.: Miami County Probation
Phone No. (765) 473-9861
Address: 25 Court Street, Peru, Indiana 46970

OFFENDER INFORMATION

Case No.(s): 52C01-0302-CM-57
Charging Name(s): Hershel R. Hammon
True Name:
Alias(es):
Address: 69 N. Fremont
City: Peru State: IN Zip: 46970
Ph: None SSN: 434-41-2639
DOB: 3-26-68 POB: Elkhart, Indiana

Age: 35 Race: Cauc Sex: M Ht: 5'5" Wt: 148
Eyes: Green Hair: Brown
ID Marks: Tattoos: Left shoulder-heart; peacock

U.S. Citizen: YES X No Alien Status

Drivers License Number: 1140-00-6198
State of Issue: IN Status: HTV-suspended for life

Criminal Involvement (Check all that apply)

___ Charge(s) Pending	X Jail	X Felony
X Probation	X Comm. Corr.	___ Juvenile
___ Res. Placement	___ Detainers	X Prison
X Misdemeanor	___ Parole	X Violation(s)
___ Juv. Detention	___ IBS/IGS	

OFFENSE INFORMATION

Present Offense(s): Domestic Battery, Class A Misdemeanor

B.A.C.:

Arrest Date: 2-26-03 Type of release: $300 cash bond
Sentencing Date: 6-6-03 Jail Credit: 3 actual days
(2-26-03 to 3-1-03)

Co-Defendant(s):

Case No.(s):

ADDITIONAL INFORMATION

COMMUNITY CORRECTIONS

CHARGEBACK OFFENSE: Y N
CHARGE BACK IF SENT TO DOC: Y N
FACILITY/PROGRAM AT CAPACITY: Y N
STAFFED BY COMM. CORR.: Y N
OTHER INFORMATION:

MARITAL INFORMATION

___ S _X_ M ___ D ___ W ___ Sep

Spouse/Other: Amy L. Hammon
Address: 590 E. Fifth St.
City: Peru State: IN Zip: 46970 Ph: (765) 473-9064
Number of Dependent Children:
Court-ordered Support: $ per Wk Mo
Other:

EDUCATION, EMPLOYMENT, HEALTH

High School: Peru High School
Grad/G.E.D.: ___Y _X_ N Verified: Y _X_ N
College/Vocational:
Employer: None
Position: $___/hr.
Hire Date: Hrs. per wk:
Mental Health Referrals: Y _X_ N
Physical Problems: Y _X_ N
Alcohol/Drug Use: _X_ Y ___N

CONTACT PERSONS

1) Name: Amy Hammon Relation: Wife
Ph: (765) 473-9064
Address: 590 E. 5th St., Peru, IN 46970

2) Name: Duke Brown Relation: Father-in-law
Ph: (765) 473-7065
Address:

3) Other:

SENTENCING INFORMATION
(Probation Use Only)

CONVICTED BY: PLEA BENCH JURY
DATE:
CONVICTED OF:
EXECUTED TIME: SUSPENDED:
LENGTH OF PROBATION:
SPECIAL CONDITIONS:

Hershel Hammon
52C01-0302-CM-57

I. SOURCES OF INFORMATION

Hershel Hammon, Defendant
Records of the Miami County Prosecutor's Office
Records of the Miami County Probation Department
Records of the Miami County Clerk's Office
Records of the White County Probation Department
Records of the Bureau of Motor Vehicles

II. PRIOR LEGAL HISTORY

A. Juvenile

See Cause No. M-207-85C in adult section.

B. Adult

10-24-85 (conviction date) – Count I: Public Intoxication, Class B Misdemeanor; Count III: Illegal Possession or Consumption of an Alcoholic Beverage, Class C Misdemeanor. Miami County Cause No. M-207-85C. Defendant is under the age of 18. Sentenced on Count I to 180 days Miami County Jail, suspended. Sentenced on Count III to 60 days Miami County Jail, suspended and concurrent to Count I. Count III: Resisting Law Enforcement was dismissed. Ordered to undergo a drug and alcohol evaluation. Placed on probation for one (1) year. Assessed court costs and probation user fees.

1-20-87 (conviction date) – Operating a Vehicle While Intoxicated and Illegal Possession or Consumption of Alcohol. Miami County Cause No. 52D0-8701-CM-21. Sentenced to one (1) year in the Department of Correction suspended. Placed on probation for one (1) year and ordered to undergo the Court's drug and alcohol evaluation. Assessed court costs and probation user fees.

11-12-87 Probation violation filed.

2-17-89 Found in violation. Balance imposed.

12-17-89 (conviction date) – Operating a Vehicle with a B.A.C. of .10% or More; Failure to Prove Financial Responsibility. Miami County Cause No. 52D01-88-12-CM-338. Sentenced to 60 days Miami County Jail on each count to run concurrently. Credit for time served. Ordered released for work and alcohol treatment. Assessed court costs and a fine.

10-15-91 (conviction date) – Operating a Vehicle While Intoxicated, Class D Felony. Miami County Cause No. 52D01-9105-CF-24. Sentenced to two (2) years in the Department of Correction, suspended except for 10 actual days. Placed on probation for two (2) years and ordered to serve 90 days home detention. Driver's license suspended for one (1) year. Ordered to undergo the Court's drug and alcohol evaluation. Assessed court costs and probation user fees.

6-8-93 (conviction date) – Habitual Traffic Offender. Miami County Cause No. 52D01-9212-CF-92. Sentenced to 1 ½ years in the Department of Correction, suspended except for 30 actual days. Placed on probation. Ordered to serve one (1) year home detention. Ordered not to operative a motor vehicle while on probation. Driver's license suspended for life. Assessed court costs, probation user fees, and a $200 fine.

2-15-94 Probation violation filed.
3-24-94 Found in violation and given credit for 6 days served.

7-3-97 (conviction date) – Count I: Operating a Vehicle After Being Adjudged a Habitual Traffic Violator, Class D Felony; Count II: Operating a Vehicle While Intoxicated, Class A Misdemeanor. White County Cause No. 91D01-9703-CF-41. Sentenced to three (3) years to the Department of Correction on Count I and one (1) year to the White Count [sic] Jail, concurrent. 1 ½ years suspended. Placed on probation for 1 ½ years.

12/98 Probation violation filed for testing positive for marijuana. The defendant reports being found in violation and serving 45 actual days in jail followed by 9 months of home detention.

9-8-00 (conviction date) – Possession of Marijuana, Class A Misdemeanor. Miami County

Cause No. 52C01-0003-CM-143. Sentenced to one (1) year in the Miami County Jail. Assessed court costs and the drug interdiction fee.

10-18-02 (conviction date) – Battery, Class B Misdemeanor. Miami County Cause No. 52C01-0204-CM-356. Sentenced to 180 days Miami County Jail, suspended. Placed on non-reporting probation for one (1) year. Assessed court costs and the initial probation user fee.
(The victim in this matter was his daughter.)

3-13-03 Probation violation filed. Pending.

2-14-03 (conviction date) – Public Intoxication, Class B Misdemeanor. Miami County Cause No. 52C01-0210-CM-394. Sentenced to 4 days Miami County Jail with good time credit. Assessed court costs.

2-26-03 (offense date) – Domestic Battery. Miami County Cause No. 52C01-0302-CM-57. Current offense.

C. Criminal Orientation

The defendant has four convictions for Operating While Intoxicated offenses as well as convictions for Illegal Consumption of Alcohol (2); Failure to Prove Financial Responsibility; Habitual Traffic Offender; Operating a Vehicle After Being Adjudged a Habitual Traffic Violator; Battery; Possession of Marijuana; and Public Intoxication. Between 1985 and 2003 the defendant has had 10 misdemeanor convictions and three felony convictions. He has been found in violation of probation in the past and was on probation for Battery when the current offense was committed. His driver's license is suspended for life. He denies gang affiliation and states he has no close friends or relatives currently serving time in the Department of Correction.

D. Summary of Legal History

Please see above.

III. PRESENT OFFENSE

A. Official Version

The official version can be found in the probable cause affidavit and police reports beginning on p. 16.

B. Defendant's Version

The defendant submitted the following written statement:

"My wife and I were arguing. My wife tryed to explain to officers that everything was fine and they told her that if she did not sign a statement against her husband they would take our children away."

IV. VICTIM IMPACT STATEMENT

Victim impact information was mailed to the victim in this matter, but no response had been received at the time of filing.

V. FAMILY/PERSONAL BACKGROUND

A. Family

N/A

B. Marital/Dependent Status

N/A

C. Education

N/A

D. Employment

The defendant was employed at Five Star Foods in Peru from 7-1-88 to 9-1-02. He was fired following his arrest for the current arrest. He is not currently employed and receives $263 per week in unemployment. He would like to manage the meat department of another store.

E. Military

N/A

F. Financial

N/A

G. Religion

N/A

H. Interests/Leisure Activities

N/A

I. Future Plans

N/A

VI. HEALTH

A. Physical

N/A

B. Mental

N/A

C. Substance Use

The defendant began consuming alcohol at age 15. His drink of preference is beer and he usually consumes up to ten when he drinks. He has numerous alcohol-related arrests. He first tried marijuana at age

16 and states at one time he smoked a couple of joints per week. He said his marijuana use can be attributed to his alcohol use because he "makes stupid decisions when drinking." He feels he has a problem with the abuse of alcohol. He states his wife would like him to stop drinking. She had filed for divorce but it was not pursued. The defendant reports participating in several court ordered substance abuse programs. He said he did not like AA but feels it helped him. He feels the AA approach dwells on the past too much. Following his arrest for the current offense the defendant asked this officer for assistance in obtaining long term substance abuse therapy. An appointment was scheduled for him with the drug and alcohol program director, but he failed to attend the appointment. He stated later he did not wish to be away from his parents who are terminally ill.

D. Present Attitude

The defendant submitted the following statement:

"My mother went into a coma March 22, 2002- also my fathers doctor said his heart is deseased to the point that there can be nothing else done for him. I do feel that an anger management class may be benificial to me.

All of My wife & my problem's stem from drinking and this year has cost a great financial burden. I right now receive $263.00 per week on unemployment so until I find another meat cutting job at least I am able to contribute to helping my wife catch up on our house taxes. We have paid on our home for around 12 yrs. It would be a shame to lose it. Also if I'm on probation I will still be able to help my father in the time he has left. My wife and I would like to reconciliate our marriage and possibly sell our home next year

and move out of the area preferably in the country-I feel it would be good for us as well as the children."

Signed: Hershel Ray Hammon

VII. EVALUATION/SUMMARY

Hershel R. Hammon is a 35 year old male who has been found guilty of Domestic Battery, Class A Misdemeanor. He is before the court for sentencing.

The defendant is married but living separately from his wife who is the victim in this matter. He lost his job of 14 years at Five Star due to his arrest for the current offense.

The defendant has a lengthy criminal history. The defendant has four convictions for Operating While Intoxicated offenses as well as convictions for Illegal Consumption of Alcohol (2); Failure to Prove Financial Responsibility; Habitual Traffic Offender; Operating a Vehicle After Being Adjudged a Habitual Traffic Violator; Battery; Possession of Marijuana; and Public Intoxication. Between 1985 and 2003 the defendant has had 10 misdemeanor convictions and three felony convictions. He has been found in violation of probation in the past. He was on probation for Battery (daughter was the victim) when the current offense was committed. His driver's license is suspended for life.

The following aggravating and mitigating circumstances are submitted for the Court's consideration during sentencing:

Aggravating

1. The defendant's criminal history.
2. Prior attempts at rehabilitation have failed.

3. The defendant was on probation for Battery when the current offense was committed.

Mitigating

None found.

VIII. RECOMMENDATION

It is respectfully recommended Hershel R. Hammon be sentenced to one (1) year in the Miami County Jail, suspended except for twenty (20) days with good time credit and credit for three (3) actual days. He should be placed on drug and alcohol probation for one (1) year consecutive to the probation under 52C01-0204-CM-356 with the following special conditions:

1. He complete the Court's drug and alcohol evaluation and follow all recommendations for treatment.

2. He complete an intake evaluation at Four County Counseling Center to determine whether he is most appropriate for Domestic Violence Group or Anger Management counseling and successfully complete the recommended program.

3. The defendant have no contact with the victim unless she specifically asks the Court to allow him to have contact.

[Costs
Probation fees
Domestic violence]

Respectfully submitted,

/s/ Cathy L. Gustin
Cathy L. Gustin
Probation Officer
Miami Circuit/
Superior Courts

STATE OF INDIANA IN THE MIAMI CIRCUIT COURT

SS:

COUNTY OF MIAMI TERM: 2003

STATE OF INDIANA

VS.

HERSHEL R. HAMMON CAUSE NO. 52C01-0302-CM-57

ADDENDUM TO PRESENTENCE INVESTIGATION REPORT

(Filed May 30, 2003)

Attached is a letter received by this officer on 5-29-03 from Amy Hammon, the victim in this matter. She states that she would like to see her husband receive probation which would require him to go through counseling. She wrote that she did not feel threatened by her husband. She is not requesting restitution.

Respectfully submitted,

/s/ Cathy L. Gustin
Cathy L. Gustin
Probation Officer

[Original Letter Handwritten]

[Received 5-29-03 CG]

Cathy Gustin,

In answer to your letter there has been no damages or bills.

As for sentencing, I would like my husband, Hershel Hammon to receive counceling and go to AA, because it has helped him in the past. I would like to see him put on probation to ensure that it happens and where he can still work to help financially and be here to help with our children. I also need his help around the house for we're remodeling the house and plan to sell it so we can move out of town. I love my husband, I just want to see him stop drinking. I do not feel threatened by his presence.

Thank you.

Sincerely,

Amy L. Hammon

FOR PUBLICATION

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Indianapolis, Indiana

ATTORNEYS FOR APPELEE:

STEVE CARTER
Attorney General of Indiana
NICOLE M. SCHUSTER
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Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

HERSHEL HAMMON,	)	
Appellant-Defendant,	)	
vs.	)	No. 52A02-0308-CR-693
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Judge
Cause No. 52C01-0302-CM-57

June 14, 2004

OPINION - FOR PUBLICATION

BARNES, Judge.

Case Summary

Hershel Hammon appeals his conviction for domestic battery, a Class A misdemeanor. We affirm in part and reverse in part.

Issues

The issues before us are:

I. whether the trial court erred by admitting into evidence statements made by the victim to the arresting officer; and

II. whether the trial court erred in allowing Hammon's $300.00 cash bond to be applied to administrative fees and to the costs of his representation by a public defender.

Facts

The relevant facts most favorable to the conviction follow. On February 26, 2003, Peru police officer Jason Mooney was dispatched to 590 East Fifth Street. Upon his arrival, Officer Mooney approached the residence and spoke with A.H., who he thought was timid and frightened. Officer Mooney inquired of A.H. whether there "was a problem and if anything was going on," to which A.H. responded, "no." Tr. p. 8. However, when he entered the house, Officer Mooney observed that the living room was in a state of disarray with broken objects littering the floor. *Id.* at 9-10. Hammon told Officer Mooney that he and A.H. had argued but that it had been resolved and had "not become physical." *Id.* at 11.

Officer Mooney then separated Hammon from A.H., at which time A.H. told him that Hammon had physically attacked her by throwing her down into the glass from a shattered heater and that he punched her twice in the chest. *Id.* at 12. Officer Mooney did not notice any visible physical injuries to A.H. However, A.H. did indicate that she was in some pain as a result of the attack.

During the time when Officer Mooney separated Hammon from A.H., Hammon attempted to enter the room where Mooney was speaking with A.H. When Hammon approached, A.H. became quiet and seemed afraid. A.H. also completed a battery affidavit.

Hammon was arrested and charged with domestic battery. A bench trial was conducted on May 9, 2003. A.H. did not testify, but Officer Mooney testified regarding A.H.'s statements. Hammon was convicted of domestic battery, a Class A misdemeanor. Hammon appeals the conviction.

Analysis

I. Admissibility of Victim's Statements

Hammon first challenges the trial court's admission of statements made by A.H. to Officer Mooney and argues that the officer's testimony relaying the statements was not admissible under the excited utterance exception to the hearsay rule.[1] We review questions regarding the admissibility of evidence only for a manifest abuse of discretion resulting in an unfair trial. *Williams v. State*, 782 N.E.2d 1039, 1045 (Ind. Ct. App. 2003).

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[1] Hammon also challenges the trial court's admission of the battery affidavit signed by A.H. and argues that it was incorrectly admitted under the present sense impression exception to the hearsay rule because A.H. did not make her statement at the same time that she perceived the event described in the statement. However, because we conclude that the trial court properly admitted Officer Mooney's testimony regarding A.H.'s statements, any error in admitting the battery affidavit was harmless because it was cumulative of Officer Mooney's testimony. *See Willis v. State*, 776 N.E.2d 965, 967 (Ind. Ct. App. 2002).

Pursuant to the Indiana Rules of Evidence, "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Certain exceptions to this rule may apply, including the excited utterance exception that is at issue in this case. Indiana Evidence Rule 803(2) defines an "excited utterance" as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Indiana courts have previously distilled this rule into three distinct elements that the party who seeks admission must prove: "(1) a startling event occurs; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event." *Williams,* 782 N.E.2d at 1046.

Officer Mooney testified that he responded to a domestic disturbance call and that when he encountered the victim, she seemed "frightened" and "timid." Tr. pp. 5, 7-8. Officer Mooney further testified that when he entered the residence, the living room was in "disarray," and he observed broken glass on the floor in front of a glass heating unit that appeared to be broken with flames coming out the front of the unit. *Id.* at 10. Officer Mooney then testified that when he removed Hammon from the room, A.H. informed him that she and Hammon had been engaged in an argument and that Hammon had broken things in the living room. Officer Mooney testified that A.H. told him that Hammon threw her down into the glass from the heater and that he punched her twice in the chest. *Id.* at 12. It is with the admission of this final statement that Hammon takes particular issue.

The facts of this case are similar to those in *Gordon v. State*, 743 N.E.2d 376, 378 (Ind. Ct. App. 2001). In *Gordon*, police responded to a domestic disturbance call and observed a woman who was "visibly shaking" and whose voice was "crackling and shaky." *Id.* The woman described to police the events that occurred the night of the battery, and the officer recounted her statements at trial. We held that the officer's testimony was correctly admitted into evidence under the excited utterance exception to the hearsay rule because the officer's observations illustrated that the victim was still upset by the startling event she described to the officer and that it was reasonable to infer that this event caused the victim's distress. *Id.* at 378.

We reach the same conclusion in this case. A startling event occurred at the residence before police arrived. Officer Mooney testified that upon entering the house, he observed broken objects littering the living room floor and flames escaping from a shattered heater. Such observations, particularly that of the broken heater, clearly indicate that a startling event had recently taken place. This element is satisfied.

Indiana Evidence Rule 803(2) further requires that the statement for which one seeks admission "was made by declarant while under the stress of excitement caused by the event." It is clear from Officer Mooney's description of A.H. as "timid" and "frightened" that he perceived her to still be under the stress of the event. Officer Mooney also stated that A.H. grew quiet when Hammon entered the room. Further, it is reasonable to infer that Officer Mooney responded promptly to the dispatch after receiving it and that he arrived in a timely manner such that, when he arrived, A.H. was still greatly affected by the earlier event.

Our supreme court has held that "[t]he amount of elapsed time between the incident and the utterance weighs in determining the ability of the witness to regain his or her composure and engage in reflective thought." *Holmes v. State,* 480 N.E.2d 916, 918 (Ind. 1985). Thus, "the heart of an inquiry is whether the declarant was incapable of thoughtful reflection." *Jones v. State,* 800 N.E.2d 624 (Ind. App. Ct. 2003). Further, "[t]he amount of time that has passed between the event and the statement is relevant but not dispostive [sic]." *Burdine v. State,* 751 N.E.2d 260, 264 (Ind. Ct. App. 2001), *trans. denied* (citing *Noojin v. State,* 730 N.E.2d 672, 676 (Ind. 2000)). "No precise length of time is required." *Gordon,* 743 N.E.2d at 378.

Although Officer Mooney did not testify as to the precise amount of time that passed between his receipt of the domestic disturbance dispatch and the time he arrived at the residence, he was justified in concluding that A.H. was still upset because of the startling event that led to the call. Further, given the officer's observations of A.H. as well as the state of her living room, the trial court did not abuse its discretion in finding that A.H. was still under the stress of the event at the time she made her statement to police. We reject Hammon's contention that A.H. was no longer under the stress of the event because the State failed to establish the precise length of time that passed before Officer Mooney arrived.

We next address the final element required to find that the declarant's statement was an excited utterance. Indiana Evidence Rule 803(2) requires that the statement at issue must be related to the startling event. A.H.'s statement clearly was related to the facts and circumstances surrounding the startling event and this element is met.

We are not persuaded by Hammon's argument that Officer Mooney's testimony should have been withheld because A.H. gave her statement in response to his questions. Our supreme court has held that "[a] declaration does not lack spontaneity simply because it was an answer to a question." *Yamobi v. State,* 672 N.E.2d 1344, 1346 (Ind. 1996). The fact that Officer Mooney questioned Hammon does not mean her statement was not an excited utterance. In sum, we hold that the trial court did not abuse its discretion in concluding that A.H.'s statement was an excited utterance.

Although we have concluded that A.H.'s statements to Officer Mooney fell under the excited utterance exception to the hearsay rule, that does not end our analysis today, given a recent and substantial change in Sixth Amendment jurisprudence announced by the United States Supreme Court while this appeal was pending. Specifically, the Court held in March of this year that when the prosecution seeks to introduce a "testimonial" out-of-court statement into evidence against a criminal defendant, the Confrontation Clause of the Sixth Amendment requires two showings: (1) that the witness who made the statement is unavailable; and (2) that the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington,* ___ U.S. ___, 124 S. Ct. 1354, 1374 (2004). In reaching this holding, the Court squarely criticized and overruled *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531 (1980).[2] *Roberts* had established the rule that hearsay

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[2] Interestingly, Justice Scalia last summer criticized the majority in *Lawrence v. Texas,* ___ U.S. ___, 123 S. Ct. 2472 (2003), for not giving due regard to stare decisis and for its "surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*." ___ U.S. ___, 123 S. Ct. at 2488 (Scalia, J., dissenting). However, Justice

(Continued on following page)

statements made by an unavailable witness were admissible against a criminal defendant if the statement fell "within a firmly rooted hearsay exception" or otherwise bore "particularized guarantees of trustworthiness." *Id.* at 66, 100 S. Ct. at 2539.

By contrast, the *Crawford* opinion held that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford,* ___ U.S. at ___, 124 S. Ct. at 1364. The Court then undertook an analysis of the state of the common law in 1791, when the Sixth Amendment was adopted, to support its conclusion that the Framers intended the Confrontation Clause to allow the admission of out-of-court "testimonial" statements by an unavailable witness only if the defendant had a prior opportunity for cross-examination.[3] *Id.* at ___, 124 S. Ct. at 1365-66. Thus,

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Scalia's majority opinion in *Crawford* never mentions the principle of stare decisis and the readiness to overrule a case decided 24 years ago, much to Chief Justice Rehnquist's chagrin. *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in judgment).

[3] The Court stated that it did "accept" the principle that a defendant could forfeit the right to confrontation through wrongdoing, presumably meaning that if a defendant causes a witness' unavailability, he cannot claim Confrontation Clause protection. *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1370. Application of the "wrongdoing" exception to the Confrontation Clause undoubtedly will be difficult in many domestic violence cases where a victim does not cooperate with the prosecution. If that is the case, police and prosecutors may then have to embark on a separate investigation into whether the defendant caused the victim's unavailability. The question will probably also frequently arise as to what amounts to "wrongdoing" by a defendant in such a scenario, i.e. will only physical "wrongdoing" (another battery) by a defendant suffice, or can psychological pressure on a victim not to cooperate be enough, and if so, how is such pressure to be measured?

proper determination of whether an out-of-court statement is admissible against a criminal defendant is no longer solely governed by whether it falls within a recognized exception to the hearsay rule. Instead, if the statement was made in a situation where the defendant did not have an opportunity for cross-examination, the statement must be excluded if it is "testimonial." If a statement is "non-testimonial," its admission in a criminal trial is left "to regulation by hearsay law. . . ." *Id.* at ___, 124 S. Ct. at 1370.

The majority in *Crawford* expressly declined to give a precise definition to the crucial word "testimonial." *Id.* at ___, 124 S. Ct. at 1374.[4] It did offer some guidance, however. First, "testimonial" statements need not necessarily be ones given under oath; unsworn statements may also be "testimonial." *Id.* at ___, 124 S. Ct. at 1364-65. Second, the Court gave the following examples of "testimonial" statements:

> ex parte in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that

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[4] Chief Justice Rehnquist, joined by Justice O'Connor, voted to uphold *Roberts* and strongly condemned the majority for not defining "testimonial," stating: "Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner." *Crawford*, ___ U.S. at ___, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in judgment).

> were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at ___, 124 S. Ct. at 1364 (citations omitted).

From these generalities, the Court extrapolated that statements made during a police "interrogation" would qualify as "testimonial" statements. *Id.* Again, however, the Court declined to precisely define "police interrogation," aside from noting that it used "the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at ___, 124 S. Ct. at 1365 n.4. It also found that the police questioning at issue in the case qualified as "interrogation" "under any conceivable definition" where the witness knowingly gave a recorded statement "in response to structured police questioning. . . ." *Id.* The Court also compared police "interrogation" to official pretrial examinations of witnesses by English magistrates or justices of the peace before England acquired a professional police force in the 19th century. *Id.* at ___, 124 S. Ct. at 1364-65. Finally, we note the Court dwelled at length upon the treason trial of Sir Walter Raleigh in 1603 and the out-of-court statements of Lord Cobham, Raleigh's alleged co-conspirator, contained in a letter and in an examination before the Privy Council, used to condemn Raleigh to death. *Id.* at ___, 124 S. Ct. at 1360.

With that background and context, we hold the statement A.H. gave to Officer Mooney was not a "testimonial" statement. It appears to us that the common denominator underlying the Supreme Court's discussion of what constitutes a "testimonial" statement is the official and formal quality of such a statement. A.H.'s oral statement was not given in a formal setting even remotely

resembling an inquiry before King James I's Privy Council; it was not given during any type of pre-trial hearing or deposition; it was not contained within a "formalized" document of any kind.[5]

The closer question is whether A.H.'s statement was produced during the course of a police "interrogation." Admittedly, A.H. gave her statement in direct response to questioning by Officer Mooney. However, we observe that the Supreme Court chose not to say that any police *questioning* of a witness would make any statement given in response thereto "testimonial"; rather, it expressly limited its holding to police "interrogation." We conclude this choice of words clearly indicates that police "interrogation" is not the same as, and is much narrower than, police "questioning." To the extent the Supreme Court said that it used the term "interrogation" "in its colloquial ... sense," we believe that reference to a lay dictionary for a definition of "interrogation" is appropriate. *Id.* at ___, 124 S. Ct. at 1365 n.4. "Interrogation" is defined in one common English dictionary as "To examine by questioning formally or officially." The American Heritage College Dictionary 711 (3d ed. 2000). This is consistent with our prior observation that the common characteristic of all "testimonial" statements is the formality by which they are produced. We also believe that "interrogation" carries with it a connotation of an at least slightly adversarial setting. *See* Roget's Thesaurus II 556 (Expanded ed. 1988) (listing as first definition of "interrogate" as "To question

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[5] A.H.'s battery affidavit would probably qualify as a "testimonial" statement, even if we were to conclude that it fell under a hearsay exception.

thoroughly and relentlessly to verify facts: *interrogate the captured soldier.*").

We thus hold that when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not "testimonial." Whatever else police "interrogation" might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police "interrogation," bolstered by television, as encompassing an "interview" in a room at the stationhouse. It also does not bear the hallmarks of an improper "inquisitorial practice." *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1364. Thus, we conclude that Officer Mooney's questioning of A.H. at her residence shortly after the incident occurred does not qualify as "police interrogation" and A.H.'s statements at that time were not "testimonial." The new rule announced in *Crawford* does not affect their admissibility.

We further note that the very concept of an "excited utterance" is such that it is difficult to perceive how such a statement could ever be "testimonial." "The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful." *Hardiman v. State,* 726 N.E.2d 1201, 1204 (Ind. 2000). To be admissible, an excited utterance "must be unrehearsed and made while still under the stress of excitement from the startling event." *Id.* "The heart of the inquiry is whether the declarants had the time for reflection and deliberation." *Id.* An unrehearsed statement made without time for

reflection or deliberation, as required to be an "excited utterance," is not "testimonial" in that such a statement, by definition, has not been made in contemplation of its use in a future trial. *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1364. We hold, given the nature of the police questioning in this case and nature of the statement itself, that A.H.'s statement to Officer Mooney was "non-testimonial" and admissible as evidence against Hammon, notwithstanding *Crawford* and Hammon's apparent lack of an opportunity to cross-examine A.H. regarding her statement.[6]

II. Proper Allocation of Cash Bond

Hammon argues that the trial court erred in ordering that his $300.00 cash bond be retained to offset the costs of his defense by the public defender. The State concedes that the order was erroneous. We dealt with this issue in *Goffinet v. State,* 775 N.E.2d 1227, 1234 (Ind. Ct. App. 2002), *trans. denied,* where the Defendant's father paid Defendant's cash bond in its entirety and the trial court retained a portion of the bond payment to cover various fees. In that case, we held that Indiana Code Section 35-33-8-3.2(a)(2) "does not authorize the trial court to order any money retained from a bond remittance for any purpose unless the bond was a 10% cash or securities deposit." *Id.* at 1233-34. In this case, the State concedes that the trial court improperly retained Hammon's bond,

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[6] Hammon also argues that there is insufficient evidence to support his conviction, but the only basis for this argument is that Officer Mooney's testimony was improperly admitted. Because we find that the trial court properly admitted Officer Mooney's testimony, we also find that the evidence presented amply supported the conviction.

which was not a 10% deposit, and we agree. Therefore, we reverse this portion of the trial court's order.

Conclusion

We find that the trial court did not abuse its discretion in admitting Officer Mooney's testimony relating a statement made by the victim following the battery. The Supreme Court's recent decision in *Crawford v. Washington* does not change this result. Therefore, we affirm Hammon's conviction. However, we reverse the trial court's order that Hammon's cash bond be retained. We affirm in part and reverse in part.

Affirmed in part and reversed in part.

KIRSCH, C.J., and FRIEDLANDER, J., concur.

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In the
Indiana Supreme Court

No. 52S02-0412-CR-510

HERSHEL HAMMON,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from the Miami Circuit Court,
No. 52C01-0302-CM-57
The Honorable Rosemary Higgins Burke, Judge

On Petition To Transfer from the
Indiana Court of Appeals, No. 52A02-0308-CR-693

June 16, 2005

Boehm, Justice.

The Sixth Amendment as interpreted by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), prohibits the introduction in a criminal

trial of testimonial statements where the defendant had no opportunity to cross examine the person who made the statements. We hold that statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial. More generally, we conclude that testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for future use in legal proceedings.

Facts and Procedural History

At 10:55 p.m. on February 26, 2003, Peru Police Department Officers Jason Mooney and Rod Richard went to the Hammons' home in response to a reported domestic disturbance. When the officers arrived, the alleged victim, Amy Hammon, was on the front porch. Mooney testified that Amy appeared to be "somewhat frightened." When he asked whether there was a "problem" or "anything was going on" she answered "No . . . nothing was the matter" and that "everything was okay."

After receiving permission from Amy to enter the house, Mooney found a gas heating unit in the corner of the living room with fragments of its glass front on the floor and flames emerging from the resulting cavity. Hershel Hammon, Amy's husband, was in the kitchen. In response to Mooney's inquiry as to what had happened, Hershel stated that he and his wife had "been in an argument" but "everything was fine now" and the argument "never became physical." Officer Richard remained with Hershel in the kitchen while Mooney returned to the

porch and again asked Amy what had occurred. Mooney testified that:

> She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater. . . .
>
> She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

Mooney then requested Amy to fill out and sign a battery affidavit reciting these allegations, and she complied.[1]

The State charged Hershel with Domestic Battery and also alleged that the battery violated the terms of his probation. The trial court consolidated Hershel's probation violation hearing and a bench trial on a domestic battery charge. The trial court explained that a preponderance of the evidence standard of proof would apply in evaluating the probation violation and a reasonable doubt standard would govern the domestic battery charge. Although the prosecutor had subpoenaed Amy, she was not present at

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[1] The affidavit stated that Hershel: "Broke our furnace and shoved me down on the floor into the broken glass and hit me in the chest and threw me down. Broke our lamps and phone. Tore up my van where I couldn't leave the house. Attacked my daughter."

the consolidated proceeding. Over Hershel's objections, Officer Mooney's testimony reporting Amy's oral statements was admitted under the excited utterance exception to the hearsay rule and Amy's affidavit was admitted as a present sense impression. The only other evidence was brief testimony by the secretary of the probation department establishing Hershel's probation status. The defense offered no evidence.

At the conclusion of the consolidated proceeding, Hershel was convicted of Domestic Battery and found to have violated parole based on the facts recited in the affidavit and in Mooney's account of Amy's statements to him. Hershel was sentenced to one-year imprisonment, with all but twenty days suspended. He was also instructed to complete a drug and alcohol evaluation, and a counseling program. Finally, the trial court allowed Hershel's $300.00 cash bond to be applied to administrative fees and the costs of his representation by a public defender.[2]

On appeal, the Court of Appeals upheld the court's admission of Amy's statements to Officer Mooney under the hearsay exception for excited utterances. *Hammon v. State*, 809 N.E.2d 945, 949 (Ind. Ct. App. 2004). The Court of Appeals did not decide whether the affidavit was properly

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[2] The State concedes that the trial court improperly retained Hershel's bond. The bond was a full cash bond, not a 10% deposit. The Court of Appeals reversed the trial court, agreeing with the State that Indiana Code section 35-33-8-3.2(a)(1) governing full cash bonds does not include the authority conferred in subsection (a)(2) to apply 10% deposit bonds to administrative costs. *Hammon v. State*, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004). The State does not challenge this ruling here, and we summarily affirm the Court of Appeals on that issue. Ind. Appellate Rule 58(a)(2).

admitted, reasoning that the issue was academic because the affidavit was cumulative of Mooney's testimony and therefore harmless, if error at all. *Id.* at 948 n.1. We granted transfer. *Hammon v. State*, 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004).

Out of Court Statements as Evidence

This case presents an all too familiar scenario: the police respond to a report of domestic violence, an apparent victim reports a battery, and the victim then does not testify at trial for reasons that are not conclusively documented in the record.[3] This fact pattern has historically presented troubling issues under state rules of evidence. As a result of the recent decision of the Supreme Court of the United States in *Crawford v. Washington*, 541 U.S. 36 (2004), we now must address the issue under both the Indiana Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

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[3] Amy wrote to the court with respect to Hershel's sentencing: "In answer to your letter there has been no damages or bills. As for sentencing, I would like my husband, Hershel Hammon, to receive counceling [sic] and go to AA, because it has helped him in the past. I would like to see him put on probation to ensure that it happens and where he can still work to help financially and be here to help with our children. I also need his help around the house for we're remodeling the house and plan to sell it so we can move out of town. I love my husband, I just want to see him stop drinking. I do not feel threatened by his presence."

I. Excited Utterance

Amy's statements to Mooney were admitted to establish the truth of the matters asserted, notably that Hershel had hit her and thrown her down. Accordingly, the statements are inadmissible hearsay unless an exception applies. In this case the trial court found Amy's statements to be "excited utterances" admissible under Indiana Evidence Rule 803(2).

The rules of most other jurisdictions include a provision similar to Federal Rule of Evidence 807, which allows hearsay not specifically admissible under one of the listed exceptions found in Rules 803 and 804 if it has "equivalent circumstantial guarantees of trustworthiness" and (A) "is offered as evidence of a material fact;" (B) "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;" and (C) "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." The proponent of the statement must provide sufficient notice to the adverse party before the statement can be used in a trial or hearing. Fed. R. Evid. 807.

The Indiana Rules of Evidence have no counterpart to this residual exception. As a result, the Indiana "excited utterance" exception has been interpreted broadly to permit admission of statements deemed trustworthy. For a hearsay statement to be admitted as an excited utterance three elements must be shown: (1) a startling event; (2) the declarant made the statement while under the stress of excitement caused by the event; and (3) the statement relates to the event. *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996). In *Yamobi* we stated:

> While a declaration is generally less likely to be admitted if it is made long after the startling event, the amount of time that has passed is not dispositive. . . . [T]he central issue is whether the declarant was still under the stress of excitement caused by the startling event when the statement was made.

Id. (citations omitted). Admissibility turns on "whether the statement was inherently reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications." *Davenport v. State*, 749 N.E.2d 1144, 1148 (Ind. 2001). Indiana appellate courts have found the exception available for statements made as much as thirty minutes after the event where the declarant was shot on the street and remained there wounded until police arrived. *See, e.g., Yamobi*, 672 N.E.2d at 1346-47. Under less stressful circumstances we have expressed doubt that such a lengthy period would qualify. *See, e.g., Davenport*, 749 N.E.2d at 1149 ("It seems somewhat of a stretch to conclude that a statement [by a witness] one half-hour after the discovery of the body was still made under the stress of the startling event.").

Whether a statement constitutes an excited utterance is essentially a factual issue subject to a clearly erroneous standard of review, sometimes described as the functional equivalent of abuse of discretion. *Id.* at 1148. In this case, the Court of Appeals affirmed the trial court based on Officer Mooney's observations that a "startling event occurred at the residence before the police arrived," and Amy's "timid" and "frightened" appearance when the police first saw her. *Hammon*, 809 N.E.2d at 949. It is unclear precisely how much time had passed between the event and the statement, but a prompt police response was

a reasonable inference from this record, and it is for the trial court to evaluate the credibility of Mooney's perceptions of Amy's stressed state. We agree that the trial court could properly infer that Amy's initial reports to Mooney were made while Amy was still under the stress of the alleged domestic violence and were unlikely to constitute an unreliable response. Accordingly, it was admissible evidence insofar as state law is at issue here.

II. Confrontation Clause

Until *Crawford* was handed down, the foregoing conclusion under Evidence Rule 803 would resolve this case. *Crawford* expressly overruled *Ohio v. Roberts,* 448 U.S. 56, 66 (1980), which had held that the Sixth Amendment's Confrontation Clause was satisfied if a statement, though hearsay, was admitted under a "firmly rooted" exception to the hearsay rule. 541 U.S. at 67. *Crawford* makes clear that in a criminal prosecution any hearsay permitted under the rules of evidence is also subject to the defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment to the United States Constitution. *Id.* at 38. As explained below, we take *Crawford* to hold that, at a minimum, the Sixth Amendment prohibits use of "testimonial" statements without the opportunity to cross-examine. Thus, no matter how "firmly rooted" the excited utterance exception may be, if an utterance is "testimonial," it is admissible only if "the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. *Crawford* thus makes clear that confrontation, not reliability, is the key to the Sixth Amendment right, which applies in state courts through the Fourteenth Amendment. *Douglas v. Alabama,* 380 U.S. 415, 418 (1965). Because it

turns only on confrontation, *Crawford* bars admission of some forms of out of court statements that have been viewed as sufficiently reliable to be admissible under Rules of Evidence.[4]

In this case it is not clear whether the declarant, Amy, was "unavailable" when she did not appear at trial after she had been subpoenaed. It is clear that the defendant, Hershel, did not have an opportunity to cross-examine Amy about her statements admitted through both the officer's testimony and her affidavit. Therefore, if either

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[4] *Crawford* cited "confessions" as an example of testimonial statements that are inadmissible without cross-examination. 541 U.S. at 51. Historically, confessions have been viewed as reliable, typically as against penal interest. Some forms of sworn testimony have also been viewed as sufficiently reliable. *See, e.g., Bintz v. Bertrand,* 403 F.3d 859, 867 (7th Cir. 2005); *Mungo v. Duncan,* 393 F.3d 327, 335-36 (2d Cir. 2004); *United States v. Massino,* 319 F.Supp.2d 295, 298-99 (E.D.N.Y. 2004). Because we conclude that the nontestimonial statements made in this case are sufficiently reliable, we do not address whether, after *Crawford,* the Sixth Amendment still bars admission of nontestimonial hearsay if it is deemed unreliable. *Compare United States v. Hendricks,* 395 F.3d 173, 179 (3d Cir. 2005) ("unless a particular hearsay statement qualifies as 'testimonial,' *Crawford* is inapplicable and *Roberts* still controls."); *United States v. Holmes,* 406 F.3d 337, 348 (5th Cir. 2005) ("With respect to nontestimonial statements, however, *Crawford* leaves in place the *Roberts* approach to determining admissibility."), *with United States v. Saget,* 377 F.3d 223, 227 (2d Cir. 2004) ("[W]hile the continued viability of *Roberts* with respect to nontestimonial statements is somewhat in doubt, we will assume for purposes of this opinion that its reliability analysis continues to apply to control nontestimonial hearsay, and that our precedents applying the *Roberts* analysis to such statements retain their force."); *Edward J. Imwinkelried, The Treatment of Prosecution Hearsay Under* Crawford v. Washington: *Some Good News But . . . ,* The Champion, Oct. 2004, at 16, 18 ("The [*Crawford*] majority's harsh criticism of *Roberts'* reliability standard makes it even more likely that the Court will eventually relax the standard for admitting nontestimonial hearsay.").

Amy's statement to Officer Mooney or her affidavit is "testimonial" then that evidence was not admissible against Hershel in his criminal trial, even though it qualifies for a hearsay exception and passes tests of reliability.

A. *Crawford v. Washington*

The Confrontation Clause of the Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford* held that the defendant's confrontation right precluded admission of a taped police interview of the defendant's wife where state law prevented the wife from testifying.[5] Exclusion of this evidence was based solely on the inability of the defendant to examine the wife. The only issue was whether the statement was admissible in evidence under those circumstances. There was no misconduct alleged on the part of either the wife or the officers who conducted the interview, and no suggestion that use of the interview was improper for any purpose other than evidence at the defendant's criminal trial.

In *Crawford,* the majority noted that the meaning of "witnesses against" was ambiguous, and thus looked to history as an aid to interpreting the Confrontation Clause. 541 U.S. at 51. No Justice objected to this methodology. The Court began with a discussion of English common law,

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[5] According to the briefs filed in the United States Supreme Court, Crawford's wife was mirandized and interviewed by two police officers at the stationhouse. Although the transcript of the interview is not explicit on these points, it seems clear that no one else was present, and the recording was by audio tape and was not under oath.

including the treason trial of Sir Walter Raleigh[6] and the bill of attainder against Sir John Fenwick.[7] *Id.* at 43-47. The Court then charted the background of the Sixth Amendment's inclusion in the Constitution and discussed the early cases interpreting the Amendment. *Id.* at 53-59. From this history the Court drew two inferences as to the breadth of the Sixth Amendment: 1) "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused;" and 2) "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 50-51.

It has been observed that the Court did not definitively resolve whether any statements that are not testimonial are nevertheless subject to Sixth Amendment restraints, and if so, what form those statements might take.[8] As the Court put it, "even if the Sixth Amendment is

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[6] *See Raleigh's Case*, 2 How. St. Tr. 1, 15-16, 24 (1603). In Raleigh's trial for high treason, a letter written by Raleigh's alleged co-conspirator, Lord Cobham, implicated both Cobham and Raleigh. Cobham had also been examined in camera by the Privy Council and both the letter and his examination were introduced as evidence against Raleigh. *Crawford*, 541 U.S. at 43.

[7] *See Fenwick's Case*, 13 How. St. Tr. 537, 591-92 (H.C. 1696) (Powys). Sir John Fenwick's counsel objected to admitting the pretrial examination of a witness who had been "spirited away," on the ground that Fenwick had no opportunity to cross-examine the witness. The examination was nonetheless admitted and Fenwick was condemned. *Crawford*, 541 U.S. at 46.

[8] "[T]he decision did not define what constitutes testimony . . . [and] [p]erhaps more significantly, the Court failed to instruct conclusively whether any *non*testimonial statements receive the protection of

(Continued on following page)

not solely concerned with testimonial hearsay, that is its primary object." *Id.* at 53. We think, however, that the thrust of the Court's opinion in *Crawford,* and the basis on which we proceed, is that testimonial statements trigger Sixth Amendment confrontation rights. The Court gave several indications that only testimonial statements implicate the Sixth Amendment. The Court expressly noted, "not all hearsay implicates the Sixth Amendment's core concerns." *Id.* at 51. The Court's discussion following this observation seems to us to assume that these "core concerns" are testimonial statements and only those are excludable on Sixth Amendment grounds. In addition, the Court reconciled the historical presence of hearsay exceptions with its view of the Confrontation Clause by pointing out that, with the exception of dying declarations, "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case."[9] *Id.* at 55 (emphasis in original). In subsequent discussion the Court expressly noted that although *White*

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the Confrontation Clause." *The Supreme Court 2003 Term,* 118 Harv. L. Rev. 25, 321-22 (2004) (emphasis in original).

[9] *See also Crawford,* 541 U.S. at 53-54, focusing on the Framers after reviewing English, Colonial, and early American experience:

> The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witness against him," . . . is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.

v. Illinois, 502 U.S. 346 (1992), rejected the notion that only testimonial statements implicate the Confrontation Clause, *Crawford*'s analysis "casts doubt on that holding." *Id.* at 61. And in conclusion the majority again expressly refrained from ruling on the point, but nevertheless observed, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Id.* at 68. In any event, whether some nontestimonial statements may be subject to Sixth Amendment limitations is not before us today. This case turns on whether Amy's statements or her affidavit were "testimonial."

A precise definition of testimonial responses is yet to be worked out, but *Crawford* identified some core forms of testimony:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. The Court also cited with apparent approval a formulation of testimonial statement as one that an "objective witness reasonably [would] believe . . . would be available for use at a later trial." *Id.* at 52. Although the Court identified these "core forms," the Court expressly left "for another day," and therefore left it to us and other courts across the United States to identify the boundaries, if any, of "testimonial" statements. *Id.* at 68.

B. *The Court of Appeals' Opinion in this Case*

The Court of Appeals concluded, "that the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement." *Hammon*, 809 N.E.2d at 952. Accordingly, the court reasoned that the Supreme Court limited its holding in *Crawford* to "police 'interrogation,'" which "carries with it a connotation of an at least slightly adversarial setting." *Id.* The Court of Appeals held that "when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'" *Id.* This conclusion has been cited for the proposition that "[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford*." *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (citing *Hammon*). *Accord State v. Veesenmeyer*, 2005 Minn. App. LEXIS 287, *10 (Minn. Ct. App. March 15, 2005) (citing *Hammon*); *State v. Alvarez*, 107 P.3d 350, 355 (Ariz. Ct. App. 2005) (citing *Hammon*); *Lopez v. State*, 888 So. 2d 693, 699 (Fla. Dist. Ct. App. 2004) (citing *Hammon*); *State v. Wright*, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004) (citing *Hammon*).

In another frequently cited passage, the Court of Appeals stated that "the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.' . . . An unrehearsed

statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial." *Hammon*, 809 N.E.2d at 952-53. The Court of Appeals has repeated this view in three other published opinions. *Beach v. State*, 816 N.E.2d 57, 59 (Ind. Ct. App. 2004); *Rogers v. State*, 814 N.E.2d 695, 701 (Ind. Ct. App. 2004); *Fowler v. State*, 809 N.E.2d 960, 963-64 (Ind. Ct. App. 2004).

The proposition that an excited utterance is per se nontestimonial has been accepted by some courts and rejected by others. The Colorado Court of Appeals agreed with this reasoning: "We also agree with the *Fowler* court's conclusion that classification of a statement as an excited utterance, while not dispositive, supports a conclusion that a statement is nontestimonial. . . . [W]e hold that where, as here, a victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial under *Crawford*." *People v. King*, 2005 Colo. App. LEXIS 111, *14-16 (Colo. Ct. App. Jan. 27, 2005). However, the court noted, "there may nevertheless be unanticipated circumstances, similar in nature, that would warrant a different conclusion." *Id.* at *16. The California Court of Appeals took issue with this view. *People v. Kilday*, 20 Cal. Rptr. 3d 161, 173 n.9 (Cal. Ct. App. 2004), *partially vacated by* 105 P.3d 114 (Cal. 2005) ("to the extent that [*Hammon*, 809 N.E.[2d] at 952-53 and *Fowler*, 809 N.E.2d at 963-64] can be read to limit the application of *Crawford* to formal interrogations, we disagree"). The Florida Court of Appeals echoed this disagreement: "While this argument has some appeal at least on the surface, we do not think that excited utterance

can be automatically excluded from the class of testimonial statements." *Lopez,* 888 So.2d at 699. *Accord Stancil v. United States,* 866 A.2d 799, 809 (D.C. 2005) (adopting the reasoning in *Lopez* that looks to nature of excited utterance).

For the reasons given below, we agree with the Court of Appeals in its view that responses to initial inquiries at a crime scene are typically not "testimonial." We do not agree, however, that a statement that qualifies as an "excited utterance" is necessarily nontestimonial. The Court of Appeals is likely correct that the declarant of an excited utterance will ordinarily lack the requisite motive because the heat of the moment makes it unlikely that the declarant is focusing on preservation rather than communication of information. But an interrogating officer may be so motivated. Thus, the "structured questioning" identified by some courts as an indicium of a testimonial statement may be best understood as evidence of a purpose to elicit testimonial statements.

C. *Other Courts' Efforts to Define "Testimonial"*

As predicted by Chief Justice Rehnquist in his separate opinion in *Crawford:* "prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists is covered by the new rule." 541 U.S. at 77 (Rehnquist, C.J., concurring in result). Of course, the same is true of judges. *Crawford* has had major implications for the criminal courts in every United States jurisdiction, and the predicted spate of appellate efforts to give guidance to trial courts on this point is underway.

Some courts have attempted to provide general guidelines to assist trial courts when deciding whether a

statement is testimonial under *Crawford*. The Colorado Court of Appeals identified testimonial statements as generally those which are: "(1) solemn or formal statements (not casual or off-hand remarks); (2) made for the purpose of providing or establishing facts in judicial proceedings (not for business or personal purposes); (3) to a government actor or agent (not someone unassociated with government activity)." *People v. Compan*, 100 P.3d 533, 537 (Colo. Ct. App. 2004). By describing the second factor as the purpose for which the statement is "made," this formulation may be read to focus on the motivation of the declarant. *See also People v. Caudillo*, 122 Cal. App. 4th 1417, 1439 (Cal. Ct. App. 2004) (911 calls are not within the core class of testimonial statements); *People v. Moscat*, 777 N.Y.S.2d 875, 879 (N.Y. Crim. Ct. 2004) ("A 911 call for help is essentially different in nature than the 'testimonial' materials that *Crawford* tells us the Confrontation Clause was designed to exclude.").

The type of statement and its audience are undoubtedly important factors in determining whether the statement is testimonial. A spontaneous exclamation by a victim to a friend, family member, or coworker is not likely to be regarded as testimonial. *See, e.g., People v. Griffin*, 93 P.3d 344, 369 (Cal. 2004) (victim's statement to a friend at school that defendant had been fondling her for some time and she intended to confront him was not testimonial hearsay within the meaning of *Crawford*); *People v. Garrison*, 109 P.3d 1009, 1011 (Colo. Ct. App. 2004) (murder victim's statements to her manager that the defendant was harassing her and threatening to kill her were admissible); *People v. Vigil*, 104 P.3d 258, 265 (Colo. Ct. App. 2004) (child sexual abuse victim's statements to his father admissible against the defendant); *Herrera-Vega v. State*,

888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (child's statements to parents reporting a "touching" were not testimonial); *Demons v. State,* 595 S.E.2d 76, 79-80 (Ga. 2004) (victim's statement to coworker that the defendant had threatened to kill the victim is admissible).

Statements made to police officers or other agents of the State are more likely to be testimonial. *See, e.g., In re Rolandis G.,* 817 N.E.2d 183, 190 (Ill. Ct. App. 2004) (seven-year-old made the same statement to his mother, a police detective, and a child abuse investigator, but only the statement to his mother was nontestimonial); *In re T.T.,* 815 N.E.2d 789, 801 (Ill. Ct. App. 2004). This is true even if the police attempt to receive the statement in a "casual" and "friendly" atmosphere. *See, e.g., People ex rel R.A.S.,* 111 P.3d 487, 489 (Colo. Ct. App. 2004) (child's videotaped statements to police in a question and answer format were testimonial); *Vigil,* 104 P.3d at 262 (child's videotaped statements to police were testimonial even though given in a relaxed atmosphere, with open-ended, nonleading questions, and with no oath); *People v. Mileski,* 2004 Mich. App. LEXIS 3022, *7 (Mich. Ct. App. Nov. 4, 2004) (unpublished opinion) (because nurse Garland, in her capacity as a forensic nurse, acted as an arm of the police and prosecution in questioning the complainant, the statement at issue was testimonial).

Some decisions have focused on whether the questioning was "structured." For example in *State v. Barnes,* 854 A.2d 208, 211 (Me. 2004), a year-and-a-half before she was murdered, a mother drove herself to the police station sobbing and reporting that her son had assaulted her and had threatened to kill her more than once during the day. The court held that her statements were not testimonial

because: 1) the police did not seek her out; 2) the statements were made when the victim was still under the stress of the assault; and 3) she was not responding to tactically structured questioning. *Id.* at 211-12.

Other decisions have focused on the audience's purpose in eliciting the statement. *See United States v. Mikos,* 2004 U.S. Dist. LEXIS 13650, *17 (N.D. Ill. July 16, 2004) (Department of Health and Human Services agents interviewed a victim of a doctor under investigation. "HHS Agents interviewed Brannon as part of a formal healthcare fraud investigation. Their purpose was to gather information for potential use against Mikos at trial, thus, the Court finds that Brannon's statements to the HHS Agents fall within the realm of testimonial statements."); *United States v. Saner,* 313 F. Supp. 2d 896, 901-02 (S.D. Ind. 2004) (a target's ex parte statements to a prosecutor who visited the target's home were testimonial because the prosecutor was procuring these statements "with an eye toward trial"); *State v. Vaught,* 682 N.W.2d 284, 292 (Neb. 2004) (because the four-year-old victim clearly understood that a medical examination was being performed, and the purpose of the doctor's questions was to assist in medical diagnosis and treatment, the victim's statements were not testimonial).

In *Kilday,* police responded to a call from the victim's employer claiming possible domestic abuse. 123 Cal. App. 4th 406 (2004), *partially vacated by* 105 P.3d 114 (Cal. 2005). When the police arrived the victim was upset, frightened, and reluctant to speak to the police and offered only minimal information. An hour later, a female officer arrived and after being briefed on the scene, was able to elicit more information. Ultimately, the victim gave a tape-recorded statement to the police. The court held that only

the first statement was nontestimonial because the officers "were not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from Kiernan about the nature and cause of her injuries." *Id.* at 422. However, the court qualified its holding:

> In reaching this conclusion, we do not adopt a blanket rule that all statements obtained from victims or witnesses by police officers responding to emergency calls are necessarily nontestimonial. The determination whether a statement obtained through police questioning in the field is testimonial requires a case-specific, fact-based inquiry. Under *Crawford,* this inquiry must center around whether the officer involved was acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution.

Id. Since the "responding officers were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene," the victim's initial responses were not testimonial. *Id.* The court also took the view that an interpretation of *Crawford* that makes the presence or absence of indicia of formality determinative is inconsistent with the Supreme Court's focus on the "production of testimonial evidence," which may occur during relatively informal questioning in the field. *Id.* at 421.

Finally, several courts have adopted essentially a "totality of the circumstances" approach, focusing on the "reasonable belief" of an "objective witness." *People v. Lee,* 124 Cal. App. 4th 483, 489 (Cal. Ct. App. 2004), *review granted,* 26 Cal. Rptr. 3d 302 (Cal. 2005) (some 911 calls may be made under circumstances which would lead an objective witness reasonably to believe that the statement

would be available for use at a later trial); *People v. Cortes*, 781 N.Y.S.2d 401, 406 (N.Y. Sup. Ct. 2004) (911 call reporting an ongoing crime and describing the perpetrator is testimonial); *State v. Powers*, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (the trial court, on a case-by-case basis, can best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement arises from interrogation).

E. *Testimonial Statements as Turning on the Motives of Both Questioner and Responder*

As observers predicted, we must look to the references in *Crawford* to "testimonial" statements to attempt to give clear guidance to trial courts as to what is and what is not prohibited by the Sixth Amendment. Justice Scalia, who authored the *Crawford* majority opinion, joined the concurring opinion of Justice Thomas in *White v. Illinois*, 502 U.S. 346, 358 (1992), arguing for a construction of "testimonial" statements limited to affidavits, depositions and the like. However, *Crawford* itself demonstrates that the term has a broader scope and applies at least to some interviews with victims or other witnesses. After considering the views of the Court of Appeals and the courts of other jurisdictions, we conclude that a "testimonial" statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement "testimonial." If the statement is taken pursuant to established procedures, either the subjective motivation of

the individual taking the statement or the objectively evaluated purpose of the procedure is sufficient.

Support for this view is found in the majority's response to Chief Justice Rehnquist's contention that the fact "[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." *Crawford,* 541 U.S. at 56 n.7. The majority contended that "[i]nvolvement of government officials in the production of testimony with an eye toward trial" was unequivocally dangerous. *Id.* These portions of *Crawford*'s analysis make clear that government involvement is typical but not essential to a "testimonial" statement. Its development "with an eye toward trial" is in our view the critical component.

We think the "use in legal proceedings" test is consistent with other language in *Crawford.* The Court identified three formal testimonial situations: 1) testimony at a preliminary hearing; 2) testimony before a grand jury; and 3) testimony at a former trial; and two substantial equivalents: 4) statements made in "police interrogation;" and 5) statements made by a defendant incident to entering a guilty plea ("plea allocutions"). *Id.* at 68. The first three and the fifth certainly are statements made by the declarant and obtained by the receiver for use in a legal proceeding. Only the fourth of these is problematic. Any question by a police officer can be described as a "police interrogation," and the Court was careful in *Crawford* to note that it used the term "in its colloquial, rather than any technical legal, sense." *Id.* at 53 n.4. We understand "police interrogation" in this context certainly to include documented structured questioning recorded in written, audio, or video devices or any other means permitting the questions and statements to be preserved and presented to

a court. That is what happened in *Crawford* itself. The frequently presented issue is whether a "police interrogation" is broader than a grilling and also extends to some or all of dealings such as the exchange between Amy and Mooney. To be sure, the very same conversation may evolve into testimonial statements. We think, however, that the other examples given by the Supreme Court indicate that a "police interrogation" is properly limited to attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect. We think judged by the "use in legal proceedings" standard, responses to initial inquiries by officers arriving at a scene are typically not testimonial.

The Court also identified as one potential definition of testimonial statements those given under circumstances that would lead an "objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. This last clue is equally vexing. It is not clear whether we are to judge the expectations of an "objective witness" by the standard of a witness knowledgeable in the law and/or a witness with no particular awareness of the use a court might make of the statement. We assume the "witness" referred to is the person giving the statement, not an observer of the statement. The *Crawford* majority gives as an example of a "nontestimonial" statement a statement of the defendant's co-conspirator to a fellow inmate, citing *Dutton v. Evans,* 400 U.S. 74 (1970). *Id.* at 57. The declarant (the co-conspirator) presumably did not expect his statements to become a piece of evidence at the defendant's trial, but an objective observer knowledgeable in the law would anticipate that possibility. Accordingly, we take this definition to exclude

statements that most people in the shoes of the declarant would consider as designed to convey information, even if a lawyer might recognize them as potentially admissible in court.

F. *Resolution of this Case*

Amy's statement to Mooney and the affidavit present different issues and neither falls clearly within the core testimonial statements identified in *Crawford*. For the reasons given above, we believe that whether a statement from a declarant to a police officer is testimonial will hinge upon the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement. If the declarant is making a statement to the police with the intent that his or her statement will be used against the defendant at trial, then the statement is testimonial. Similarly, if the police officer elicits the statement in order to obtain evidence in anticipation of a potential criminal prosecution, then the statement is testimonial. We recognize some commentators have taken a broader view of *Crawford*'s prohibition. *See, e.g.*, Andrew Siegal, *Court is Adjourned – What Have We Learned?*, 16 S. Carolina Lawyer 14, 20 (Sept. 2004) (use of police officer's report of alleged domestic-violence victim's statement "almost certainly" unconstitutional under *Crawford*). Under our view of the standard for a testimonial statement, however, the motivations of the questioner and declarant are the central concerns. These present factual issues as to which the findings of the trial court should be upheld unless clearly erroneous. Because the admissibility of Amy's statements arose in the trial court before *Crawford* was decided, there were no rulings other than a finding that Amy's statements were excited utterances.

Despite the absence of findings, we think the undisputed facts are sufficient to determine that the initial exchange between Mooney and Amy fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what. Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene. Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial. Accordingly, her oral statement was not testimonial.

The affidavit is another story. After Amy explained to Officer Mooney what had happened between her and the defendant, Mooney asked Amy to complete and sign the affidavit. Clearly, the purpose in securing the affidavit was to record and document Amy's account, and at least one principal reason to preserve Amy's story was to provide a basis for its use as evidence or impeachment in Hershel's potential criminal prosecution. We think that for these purposes it is irrelevant whether that was Mooney's subjective conscious purpose, or Mooney was simply following procedures designed by others to accomplish, among other things, the goal of preserving the statement for potential legal use. Therefore, the admission of the affidavit was in violation of Hershel's constitutional rights under the Confrontation Clause. *See People v. Shreck,* 107 P.3d 1048, 1060-61 (Colo. Ct. App. 2004) (affidavits provided solely to authenticate documentary evidence do not violate the Confrontation Clause, but authenticating affidavits that are used to prove the material facts of

habitual criminal proceedings were in violation of the Confrontation Clause).

The Court of Appeals affirmed the trial court on the ground that "any error in admitting the battery affidavit was harmless because it was cumulative of Officer Mooney's testimony." *Hammon*, 809 N.E.2d at 948 n.1. "Error in the admission of evidence may be harmless when the evidence is merely cumulative of other properly admitted evidence. *Black's Law Dictionary* 596 (8th ed. 2004) defines cumulative evidence as 'additional evidence that supports a fact established by the existing evidence (especially that which does not need further support).'" *Witte v. Mundy*, 820 N.E.2d 128, 135 (Ind. 2005).

It is true that the affidavit merely repeated the substance of Amy's oral statements to Officer Mooney. However, we do not think that is the end of the inquiry. *Crawford* teaches that the admission of testimonial hearsay violates the Sixth Amendment to the Constitution of the United States. Under *Chapman v. California*, 386 U.S. 18 (1967), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991), federal constitutional errors must be harmless beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 15 (1999). As *Crawford* makes clear, our views on alternative means of assuring reliability or trustworthiness of an out-of-court statement are irrelevant for Sixth Amendment purposes. Other means of assuring reliability are not substitutable for confrontation and cross examination: "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." *Crawford*, 541 U.S. at 67.

Evaluation of potential harm from the affidavit is difficult to resolve on the sparse record. Some decisions have held testimonial statements such as Amy's affidavit to be admissible *because* they were testimonial (for example under oath) and therefore reliable. *See, e.g., United States v. Gallego,* 191 F.3d 156, 168 (2d Cir. 1999) (plea allocution); *United States v. Papajohn,* 212 F.3d 1112, 1120 (8th Cir. 2000) (grand jury); *Nowlin v. Commonwealth,* 579 S.E.2d 367, 371-72 (Vir. Ct. App. 2003) (statement made to police while defendant was in custody on pending charges was deemed to be more clearly against penal interest and thus more reliable). *Crawford* plainly rejects this contention. *Crawford,* 541 U.S. at 65 (describing it as adding "insult to injury"). *Crawford* makes clear that reliability derived from formality or any other source does not justify doing away with the confrontation requirement. We nevertheless agree that there is some plausibility to the idea that a statement given in a more formal manner may be more well considered and perhaps is entitled to greater credibility. Accordingly, despite its failure to salvage the statements from a Confrontation Clause challenge, the formality of the affidavit may have lent credibility in a jury's mind. If this were a jury trial, under a reasonable doubt standard, perhaps the affidavit with its attendant formality would have significantly affected the ultimate conclusion of the trier of fact. Because the case was tried to the bench, however, we need not resolve the potential impact of the affidavit in a jury trial. We find the error harmless beyond a reasonable doubt in light of the surrounding contrary physical evidence and Amy's initial responses to Officer Mooney. *See United States v. Clark,* 559 F.2d 420, 426 (5th Cir. 1977) (citing bench trial versus trial by jury as a factor in evaluating whether error is harmless beyond a reasonable doubt).

Conclusion

The judgment of the trial court is affirmed.

Shepard, C.J., and Dickson, Sullivan, and Rucker, JJ. concur.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 31, 2005

Mr. Richard D. Friedman
625 South State Street
Ann Arbor, MI 48109

Re: Hershel Hammon
v. Indiana
No. 05-5705

Dear Mr. Friedman:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. This case is to be argued in tandem with No. 05-5224, *Davis v. Washington*.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk